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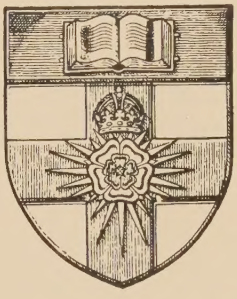

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Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

BROWNE *v.* LA TRINIDAD.

C. A.
1887
Oct. 26, 27.

[1887 B. 4847.]

Company—Extraordinary General Meeting—Irregularity in Board Meeting summoning General Meeting—Adoption of Agreement prior to Formation of Company—Removal of Directors.

A meeting of directors passed a resolution to summon an extraordinary general meeting at which were to be proposed special resolutions for removing *B.* from the office of director, and for increasing the capital. The articles gave power to remove directors by special resolution. The only notice *B.* had of the board meeting was a notice given less than ten minutes before the time of holding it, and not stating the nature of the business. The notices for the general meeting were issued, and four days before the time for the meeting *B.*, who up to that time had made no complaint of the short notice, brought his action to restrain the company from holding the meeting, on the ground that the board which summoned it was not duly constituted, as *B.* had not received proper notice and could not attend. The general meeting was held and passed the resolutions. *Charles*, J., after this granted an injunction restraining the company from confirming the resolution to remove *B.*:—

Held, on appeal, that assuming the board meeting to be so far irregular that the Plaintiff might have objected and required another to be summoned, the general meeting, having been summoned, in all other respects regularly, by directors acting as a board, was competent to act.

Harben v. *Phillips* (1) distinguished.

Whether, if the Plaintiff had at once complained of the short notice and

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required a fresh board meeting to be called, the Court would not have prevented the holding the general meeting till this had been done, *quære.*

Before the formation of the company an agreement was entered into between *B.* and a person as trustee for the intended company, by which it was stipulated (*inter alia*) that *B.* should be a director and should not be removable till after 1888. The 6th clause of the articles provided that the directors should adopt and carry into effect the agreement with or without modification, and that subject to such modification (if any) the provisions of the agreement should be construed as part of the articles. The agreement was acted upon, but no contract adopting it was entered into between the Plaintiff and the company:—

Held, that treating the agreement as embodied in the articles, still there was no contract between *B.* and the company that he should not be removed from being a director, the articles being only a contract between the members *inter se*, and not between the company and *B.*:—

Held, therefore, that the order for an injunction must be discharged.

Whether a stipulation that a director shall not be removable will be enforced by the Court, *quære.*

A COMPANY called *La Trinidad, Limited,* was incorporated on the 28th of November, 1884. Previous to its incorporation an agreement dated the 24th of November, 1884, was entered into between the Plaintiff *Browne,* therein called "the vendor," of the first part; *J. C. K. Van Ee,* of the second part; and *E. Harvey,* "acting for and on behalf of a limited company about to be incorporated under the *Joint Stock Companies Acts* by the name of *La Trinidad, Limited,*" of the third part, by which the Plaintiff agreed to sell to the company certain mining property in *Mexico* to be paid for by fully paid-up shares in the company. By the 5th clause of this agreement it was stipulated that "upon assurance of the property, or earlier if the company shall require, the vendor shall become a director of the company, and shall not be removed or bound to retire by rotation until after the year 1888."

The memorandum of association stated as the first of the objects of the company "to adopt and carry into effect, with or without modification as may be mutually agreed upon, an agreement dated the 24th day of November, 1884, and made between [parties as above], a copy whereof is set forth in the schedule to the articles of association of this company."

The Plaintiff was not one of the subscribers to the memorandum.

The articles of association contained the following clauses:—

"6. The directors shall adopt on behalf of the company and carry into effect the agreement referred to in the memorandum of association, dated the 24th of November, 1884, copy whereof is set forth in the schedule hereto, with or without modification, as they may think fit. Subject to such modification (if any) the said agreement is hereby confirmed, and the provisions thereof, so far as are applicable to the company and remain to be performed, are incorporated with and shall be construed as part of these presents."

Clause 82 provided that the number of directors should at no time exceed seven or be less than three, as might be determined by the board. Clause 89 provided that any director might resign on giving notice in writing, and that every director who should become bankrupt or insolvent, or compromise or compound with his creditors, or become a lunatic, or cease to attend the meetings of the board for three months without permission should thereupon be disqualified from being and cease to be a director, and the vacancy thereby occasioned might be filled up in manner thereinbefore provided.

"91. The company may by special resolution, save as aforesaid, remove any director before the expiration of his period of office, and if they think fit appoint a qualified shareholder in his stead, and the director so appointed shall in all respects stand in the place of his predecessor."

On the 2nd of February, 1885, the directors passed a resolution that the Plaintiff "be invited to join the board pursuant to clause 5 of agreement dated the 24th day of November, 1884, page 34 of articles of association," and this was confirmed at a subsequent meeting on the 9th of February, 1885. The Plaintiff accordingly took his seat as director, and regularly attended the board meetings.

Disputes arose between the Plaintiff and the other directors, it being alleged that the Plaintiff had not substantially fulfilled his agreement as to making over the Mexican property to the company. Ultimately, on the 28th of September, 1887, at a meeting of directors at which a quorum of two was present, the Plaintiff not being one, a resolution was passed that notice should

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be issued for an extraordinary general meeting of shareholders to be held on the 12th of October, at which the following special resolutions should be proposed:—

"1. That in accordance with art. No. 91 of the articles of association of *La Trinidad, Limited*, Mr. *J. T. Browne* be removed from the directorate of the company."

The second proposed resolution was to increase the capital by the issue of 50,000 preference shares of £5 each.

Notices were accordingly issued by the secretary, purporting to be by order of the board, for an extraordinary general meeting to be held on the 12th of October, and for a subsequent meeting to be held on the 28th, for the purpose of confirming any resolutions passed at the first meeting. The notice required for such meetings was seven days at least, and this direction was observed.

On the 8th of October, 1887, the Plaintiff commenced this action against the company and the other directors, claiming, *inter alia*, a declaration that the company had no power to remove the Plaintiff from being a director until after 1888; a declaration that the extraordinary general meeting convened for the 12th of October had not been duly convened; an injunction restraining the Defendants from holding that meeting, and an injunction to restrain the Defendants other than the company from preventing the Plaintiff's acting as director, and from excluding him from meetings of the directors.

The ground on which the Plaintiff alleged the extraordinary meeting not to be duly convened was, that it was not summoned by the resolution of a duly constituted board meeting. The secretary deposed that notice of the board meeting was given in writing to all the directors who were in *England* except one, who received only verbal notice. The Plaintiff deposed that he only received the notice, which in his case was in writing, two minutes before the time appointed for the meeting, and that the notice did not state the nature of the business. The secretary deposed that it had been customary to summon board meetings at very short notice, that the Plaintiff had never objected to the practice, and never before bringing this action had made any complaint of the shortness of the notice for the meeting of the 28th of September. He further said that the Plaintiff's office was not more

than five minutes' walk from the company's office, where the board meeting was held, and that he had served the notice at about 3·20 (ten minutes before the time of meeting). It appeared that the meetings of directors previous to the one now in question had been held at the Plaintiff's office.

The articles contained no regulation as to the mode of summoning board meetings.

On the 12th of October the extraordinary general meeting was held. About 200 shareholders attended, and passed both resolutions unanimously.

On the 19th of October the Plaintiff moved before Mr. Justice *Charles*, as Vacation Judge, for an injunction. His Lordship briefly stated that there was in his opinion an initial informality about the proceedings which could not be got over, for that practically the Plaintiff had no notice of the board meeting of the 28th of September. An injunction was therefore granted restraining the company from holding any meeting at which it was proposed to confirm the first resolution, and restraining the other directors from preventing or hindering the Plaintiff from acting as a director.

The Plaintiff filed an affidavit stating that the agreement of the 24th of November, 1884, had been adopted by the company without any modification. He did not, however, put in evidence any resolution or any document whatever shewing that the company had done so.

The Defendants appealed, and the appeal was heard on the 26th of October, 1887.

Napier Higgins, Q.C., *Latham*, Q.C., and *Stokes*, for the appeal:—

Mr. Justice *Charles* decided this case on the ground that *Browne* had so insufficient a notice of the board meeting that he was in fact to be considered as having had no notice at all. But there was no rule as to the length of notice for a board meeting, and it is shewn that very short notice had been usual. If the directors had proposed to pass a resolution to remove the Plaintiff, it would of course have been essential that he should have full notice in order that he might defend himself—but here he had full notice

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of the general meeting at which his conduct was to be impeached, and of the resolution intended to be proposed at it, so he had full opportunity of defending himself. To treat the shareholders' meeting as invalid because the Plaintiff had a short notice of the board meeting would be a mere technicality, and a technicality resting on no technical ground, as the length of notice was not prescribed. Then as to the power of the shareholders to remove him, the 91st article gives power to remove a director before the expiration of his period of office. It is contended that there is a bargain in the articles that the Plaintiff shall not be removed till after 1888. But the articles are only a contract between the shareholders *inter se*, and nothing contained in them can be enforced by an outsider as a contract entered into with him: *Eley* v. *Positive Life Assurance Company* (1). Moreover, the clause in the articles does not say that all the clauses of the agreement are to be embodied in the articles so far as they are not modified—it empowers the directors to adopt the agreement with or without modification, and until the agreement has been adopted (and it is not shewn that it ever has been) there is no agreement on which the Plaintiff can rely. Then, again, the Plaintiff has not fulfilled his agreement with the company as to the mining property, and he cannot come here to enforce an agreement to continue him as a director when he does not fulfil his part of the bargain. It has been held that a company has no inherent power to dismiss directors: *Imperial Hydropathic Hotel Company, Blackpool* v. *Hampson* (2); but here there is under sect. 91 an express power.

Marten, Q.C., and *D. L. Alexander*, for the Plaintiff:—

The Plaintiff had substantially no notice of the board meeting at which it was intended to pass a resolution for recommending the shareholders to remove him. It is contended by the Appellants that this did not signify, for that the Plaintiff could defend himself before the meeting of shareholders, but it is most unfair that he should go before the shareholders with a recommendation by the board to remove him, without his having had an opportunity of being heard against the making this recommendation.

(1) 1 Ex. D. 88. (2) 23 Ch. D. 1.

The business of a company cannot be transacted without some notice of board meetings being given. It could never be held that two directors being a quorum could meet without notice to any one else and pass binding resolutions. The board meeting then was irregular.

[COTTON, L.J.:—Have you any authority laying down that an informality in summoning the board which calls the meeting of shareholders will deprive the meeting of shareholders of its powers, when it has in all other respects been regularly summoned?]

Yes; *Harben* v. *Phillips* (1) is to that effect.

[LINDLEY, L.J.:—Supposing that to be so, could not a duly constituted board of directors ratify the notice summoning the shareholders' meeting?]

We submit not; at all events they did not. We say further that the meeting of shareholders had no power to remove the Plaintiff at all. Art. 91 is taken from rule 65 of the form in Schedule I., Table A, to the *Companies Act*, 1862, with this important modification—that the words "save as aforesaid" are introduced. Those words are manifestly intended to refer to the agreement referred to in clause 6, there being nothing else to which they can be referred. The effect is that the Plaintiff is excepted from art. 91. We are not seeking specific performance of the agreement of the 24th of November, 1884, we rely on its embodiment in the articles as making the Plaintiff an irremovable director.

Napier Higgins, in reply:—

Both resolutions were passed unanimously, and no objection was taken either then or previously that the Plaintiff had not been duly summoned to the board meeting. It would paralyze companies if meetings of shareholders were to be invalidated after they had been held, on the mere ground that there was a failure to give some one director due notice of the board meeting which convened them. The rules as to meetings of directors are summed-up in *Collie's Claim* (2). It is shewn by *Foss* v. *Harbottle* (3) how

(1) 23 Ch. D. 14. (2) Law Rep. 12 Eq. 246.
(3) 2 Hare, 461.

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slow the Court is to interfere in the internal affairs of companies, and no case goes the length of shewing that some informality in the proceedings of the directors takes away the power of a meeting in other respects duly summoned. *Harben* v. *Phillips* (1) certainly does not, for in that case persons acted as directors who probably had no right to act, and excluded persons who probably had a right to be there. There is no allegation that the directors ever adopted the agreement of the 24th of November, 1884, though they acted on it, so it is not binding on the company: *In re Empress Engineering Company* (2); *In re Northumberland Avenue Hotel Company* (3). The company could alter their articles by special resolution.

COTTON, L.J.:—

This case comes before the Court on an appeal from a decision of Mr. Justice *Charles* given in the vacation. The Plaintiff, who is a director of the Defendant company, has brought this action against the company and the other directors to restrain them from acting on a resolution which had been passed at a meeting of directors for issuing a notice summoning a meeting of shareholders, and also to restrain the Defendant directors from excluding him from acting as a director. The case raises points of considerable importance. The meeting of shareholders was summoned, not only to determine whether the Plaintiff should be removed from the position of director, but also to decide as to the authorization of an increase of capital. Only one point was decided by Mr. Justice *Charles*—it was this: He thought there was an initial irregularity which prevented the meeting of the shareholders from being so called as to be capable to act, and he came to this conclusion because, as he considered, the Plaintiff substantially had not been summoned to the board meeting which gave directions for the issue of the notices summoning the meeting of shareholders. Was he right in that? It seems that the chairman and some of the other directors on the morning of the 28th of September determined to have a meeting to consider questions to be laid before a special general meeting of the share-

(1) 23 Ch. D. 14. (2) 16 Ch. D. 125.
(3) 33 Ch. D. 16.

holders. A verbal notice of a board meeting was given to one of the directors, Mr. *Foreman*, who told the secretary that he could not attend. A written notice was left with the Plaintiff, whose office was at a very short distance from the office where the board meeting was to be held. This notice was left a few minutes before the time fixed for the meeting; he received it before the meeting, and five minutes would have taken him to the place where the meeting was to be held. He did not go, nor until the commencement of this action on the 8th of October—the meeting being summoned for the 12th—did he make any objection to the calling of the board meeting at such short notice. That is very material, because if he had at once given the other directors notice and said: "I object to the calling of the board on such short notice to consider this question," that might have altered the case. The other directors might then have called a fresh meeting of the directors and considered the question, and allowed him to state the objections he had to these resolutions being put before the special general meeting. There was time to do this, as only a seven days' notice of a general meeting was requisite. In my opinion, under the existing circumstances, it cannot be said that the board was not so summoned as to be able to act as a board. It is a very different question whether the other directors were quite right in acting as they did in giving such short notice. It was suggested by Mr. *Marten* in argument that it was done unfairly, in order to exclude the Plaintiff, and prevent him from urging any reasons which he had against his being removed from the board of directors and against the increase of capital. There is nothing in the affidavits as to that, and it is not right that we should act upon a suggestion which is raised in that way, when the plaintiff does not swear to it, and when, so far as I see, there is nothing in the facts which can be relied on as supporting a suggestion of that sort. If the Plaintiff had at once complained of the shortness of the notice of the board meeting before the board had summoned the general special meeting of the shareholders, it would have been a question whether the Court ought not to have restrained the directors from calling the meeting without giving an opportunity to the Plaintiff, as one of the then directors, to lay before the board his views in reference to the

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questions to be brought before the special general meeting. But the only question which we have now to consider is whether, even if there was such an informality that the Court might have interfered before the board had summoned the special general meeting, that meeting can be said to have been called without authority and to have been incompetent to act, though the resolution of the board had been passed at a meeting of the directors of which everybody except the Plaintiff had sufficient notice, and he did not raise any objection as to the shortness of the time, nor does he now shew that he could not have gone to the board meeting before the other directors had passed the resolutions. In my opinion, if there was an irregularity at the board meeting it was not such an irregularity as to vitiate the action of the board, and even if there had been an irregularity in the constitution of the board, it would not have deprived the general body of shareholders of the power of acting, when the notice was issued by the directors as such, and was signed in the usual way by the secretary as required in the articles on behalf of the directors. I think Mr. Justice *Charles* failed to give due consideration to the principle that a Court of Equity refuses to interfere where an irregularity has been committed, if it is within the power of the persons who have committed it at once to correct it by calling a fresh meeting and dealing with the matter with all due formalities. But in my opinion there was a sufficient notice sent to the Plaintiff to prevent him from contending now that the meeting of the board was a meeting of persons who were not competent to act as a board of directors. There was therefore nothing to make the issue of the notice irregular, and even if there was an irregularity in the board meeting which might have enabled the Plaintiff to insist that it should be postponed and another board meeting called, that would not vitiate the special general meeting so as to prevent its exercising the powers which are given to it by the articles.

It was contended that in *Harben* v. *Phillips* (1) it had been laid down that where there is an irregularity in the constitution of the board it cannot effectually call a general meeting. But I think that that case is not quite understood. The words

(1) 23 Ch. D. 14.

"irregularity in the constitution of the board" did not mean some irregularity in summoning persons who were in fact directors, such an irregularity as the mere non-issue of a notice to a particular director, or not giving him sufficient notice. There the case was that the supposed board was a meeting of persons two of whom were not directors at all, and the persons who met had excluded those who the Court thought ought to have been admitted in the place of the two persons whom I have mentioned. That clearly is a very different case. There had been a meeting where some who were not legally directors were present, and some who were legally directors were excluded, and we decided that it was not a meeting which could discharge the duties of a board.

We now come to what may be called the substance of the case, and unfortunately from the course the case took before Mr. Justice *Charles* we have not the benefit of his opinion upon it. The question is this: Had the general meeting (assuming it to have been regularly called by the notice, as I hold it was) power to remove the Plaintiff from being a director. That turns primarily on the 91st of the articles: "The company may by special resolution, save as aforesaid, remove any director before the expiration of his period of office, and if they think fit appoint a qualified shareholder in his stead, and the director so appointed shall in all respects stand in the place of his predecessor."

A resolution for removing the Plaintiff was passed, which is to be brought for confirmation before the meeting to-morrow, if that meeting can be held. But for those words "save as aforesaid" and the agreement referred to in the 6th clause of the articles, there would be no doubt that the company can by a special resolution remove any director. But those words "save as aforesaid" undoubtedly cause a difficulty. Before the company was formed, an agreement of the 24th of November, 1884, between the Plaintiff and a trustee for the intended company, was entered into, the 5th clause of which is this: "Upon assurance of the property, or earlier if the company shall require, the vendor shall become a director of the company, and shall not be removed or bound to retire by rotation until after the year 1888." That of course was a contract in no way binding the company, having been entered into before the company was formed. But

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the 6th article says: "The directors shall adopt on behalf of the company and carry into effect the agreement referred to in the memorandum of association dated the 24th day of November, 1884" (that is the agreement to which I have referred), "a copy whereof is set forth in the schedule hereto, with or without modification as they may think fit. Subject to such modification, if any, the said agreement is hereby confirmed, and the provisions thereof, so far as are applicable to the company and remain to be performed, are incorporated with and shall be construed a part of these presents." It is contended on behalf of the Plaintiff that "save as aforesaid" in art. 91 refers to art. 6, and refers therefore to the 5th clause in the agreement of the 24th of November, 1884, and that the proper meaning of art. 91 is, that subject to the provisions in favour of the Plaintiff contained in the agreement of November, 1884, the general special meeting may by special resolution remove any director. Is that the proper meaning to give to it? "Save as aforesaid" does not fit in very well, because this stipulation in favour of the Plaintiff is nowhere referred to in the articles, and it would be very strong, as a mere matter of construction, even if there was nothing else to which the words "save as aforesaid" could be referred, to say that they meant subject to the provisions of the agreement of the 24th of November, 1884. To my mind any draftsman of ordinary skill drawing such an article as this would, if that had been the intention, have said "subject to the provisions of the agreement of the 24th of November." I think, however, that the words "save as aforesaid" in art. 91 are explained by reference to art. 89, which in certain events requires the removal of directors from office. The difficulty of referring the words "save as aforesaid" to that clause is, that when a director comes under clause 89 he *ipso facto* ceases to be a director, and it is not necessary there should be any resolution to remove him. This prevents the words "save as aforesaid" from accurately fitting that previous provision, but to my mind there is very much less difficulty in supposing that "save as aforesaid" was intended to refer to clause 89, than in throwing it back to art. 6 and to something which is not recited, but is only referred to in that clause. I think that the draftsman, when he

introduced a clause enabling the company by special resolution to remove a director, was afraid that some question would be raised, unless he put in something to shew that it would not be necessary to have a special resolution in the events referred to in art. 89, and so through over caution introduced the words "save as aforesaid." In my opinion, therefore, the "save as aforesaid" does not limit the power of removing a director which is given to the company to be exercised at the general meetings, and does not help the case of the Plaintiff.

But there is another point which we ought, I think, to consider. Assuming that an unlimited power is given to the meeting by art. 91, ought we, having regard to the contract entered into by the memorandum of the 24th of November, 1884, and art. 6, to interfere by injunction to restrain the company in general meeting from acting under that power? I do not give any opinion upon the question how far the Court would have interfered by injunction in order specifically to enforce an agreement between the company and the Plaintiff that he should be an irremovable director. That point raises questions upon which I should not like to give any opinion without having them fully discussed. In my opinion we ought not to interfere in the present case, because there is no such contract between the Plaintiff and the company. The memorandum of agreement of the 24th of November, 1884, is in no way a contract between the Plaintiff and the company. It is said that it was adopted and incorporated into the articles, but I cannot accede to that. The company by its directors acted upon the agreement, but that does not make it binding on the company. Then is it incorporated into the articles in such a way as to entitle the Plaintiff to say I have such a contract between me and the company as can be enforced by a Court of Law, and as I might enforce in equity by way of specific performance? That point is clearly settled, I think, by *Eley* v. *Positive Life Assurance Company* (1). There two of the members of the Court of first instance held, and the other member did not express dissent, that the articles are merely a contract between the shareholders *inter se*, and that though a person in whose favour a stipulation is made in the

(1) 1 Ex. D. 20, 88.

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articles may afterwards have shares allotted to him, he does not by that means become in the same position as if he had entered into a contract with the company. This decision was affirmed on appeal. There is therefore no contract between the Plaintiff and the company that he shall not be removed from the office of director, and there is no ground for the Court interfering by way of injunction to restrain the company from coming to such resolutions as they think fit at the meeting to-morrow. The appeal must be allowed with costs here and below.

LINDLEY, L.J.:—

This appeal raises two questions, each of which is somewhat important. I will first address myself to the question of substance, whether it is or is not competent for the shareholders of this company to remove Mr. *Browne* from the position of director. His case is that upon the true construction of the articles of association and the contract set out at the end of them and embodied in clause 6, there is a contract between him and the company, by virtue of which he is made irremovable until the end of the year 1888. It appears to me that, having regard to the authorities, which are now somewhat numerous, he fails to establish that position. Having regard to the construction put upon sect. 16 of the *Companies Act* of 1862 in the case of *Eley* v. *Positive Life Assurance Company* (1), and subsequent cases, it must be taken as settled that the contract upon which he relies is not a contract upon which he can maintain any action, either on the common law side or the equity side. There might have been some difficulty in arriving at that conclusion if it had not been for the authorities, because it happens that this gentleman has had shares allotted to him, and is therefore a member of the company. Having regard to the terms of sect. 16, there would be some force, or at all events some plausibility, in the argument that, being a member, the contract which is referred to in the articles has become binding between the company and him. Of course that argument is open to this difficulty that there could be no contract between him and the company until the shares were allotted to him, and it would be remarkable that,

(1) 1 Ex. D. 88.

upon the shares being allotted to him, a contract between him and the company, as to a matter not connected with the holding of shares, should arise. There are difficulties in the construction of sect. 16 of the Act of 1862, but those difficulties have been removed by the authorities, which shew that *Browne* has no contract with the company which he can enforce either at law or in equity. I do not lose sight of the fact that it is necessary to be cautious in this matter, because he has filed an affidavit at the last moment, in which he says that the contract of the 24th of November, 1884, has been adopted by the company without any modification. What that means is, to say the least of it, uncertain. He has not put in evidence any document or resolution shewing that the company have entered into a contract with him to the effect of the contract set out in the schedule to the articles. If there is any such contract, the observations I have made fall to the ground, but I cannot, merely because a man swears that a contract not binding on the company has been adopted by the company, come to the conclusion that there is a contract binding the company. That may be only his inference of law. If his case is, that since the formation of the company the company have contracted with him not to remove him from his directorship, he must prove it, and this he has not yet done. It appears to me upon the materials before us that he has no contract with the company.

Now if that is the true view of the Plaintiff's legal position, there is a great difficulty in holding that he is not removable under art. 91. Construe "save as aforesaid" how you like, I doubt his being able to make out that he is not removable. If I am right in my first position the real effect of "save as aforesaid" in that clause is, to say the least of it, obscure. I have looked at the articles to see if I could come to any conclusion upon it, and it appears to me, as it does to the other members of the Court, that the true explanation is that which has been given by Lord Justice *Cotton*. If it had been intended to except Mr. *Browne* from the operation of that clause I think that it would have been so stated in unmistakable language, and other words than those found would have been used. This disposes of the question of substance.

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I now come to what I may call the question of technicality—the alleged irregularity of the meeting. Mr. *Browne* says, whatever right the company may have to remove me by special resolution, they have no right to act upon the notice which was issued by the secretary to summon a general meeting. The objection is this: It appears that on the 1st of October, 1887, Mr. *Harvey*, the secretary of the company, issued a notice convening an extraordinary general meeting of the members of the company for two purposes—for the purpose of passing a special resolution removing Mr. *Browne* from the board of directors, and for the purpose of passing a resolution authorizing the increase of the capital of the company. This notice convening the meeting purports to be issued by order, which I suppose means by order of the board of directors. The Plaintiff contends that it has been issued without proper authority, for that Mr. *Harvey*, the secretary, issued it, not by the order of the board of directors, but by the order of two of the directors not duly assembled. If that is so, then he says it is not competent for the shareholders to pass this resolution, and what they do at a meeting thus irregularly called will be invalid, and ought to be stopped.

Now let us look at the facts. In the first place, Mr. *Browne* in his notice of motion does not seek to restrain the company from increasing the capital. He does not ask that all proceedings under this alleged irregular notice shall be stopped. He confines his application to the first part of it, and asks the Court to restrain the shareholders from passing any resolution removing him. If there were anything in his objection he would be entitled to go on and ask the Court to restrain the shareholders from passing any resolution at all. Now let us look a little more closely at this matter. It appears that the directors of this company had been in the habit of holding meetings at short notice, convened without any, or if any, without much formality. It appears that before the meeting of the 28th of September the meetings of the directors were usually held at the office of Mr. *Browne* himself, and he never raised any objection to the shortness of the notice before this. The meeting is quarrelled with upon the ground that sufficient notice was not given to all the members of the board to assemble and hear what was proposed to be done. The

power of the board to convene a meeting of the shareholders is contained in clause 56 of the articles, and runs thus: "The directors may, whenever they think fit, call an extraordinary meeting," and then it provides that they shall be bound to do so upon such requisition as therein mentioned. "The directors may whenever they think fit." That means, I apprehend, that the directors may do it at a meeting properly convened. I do not think it means that any directors may without consulting the others call an extraordinary meeting. I think that, so far, Mr. *Marten's* argument is right, and if the Plaintiff had complained that the meeting of directors convened at such a short notice was not duly convened, and had sought the interference of the Court to prevent the directors from acting on a resolution passed at it, I can understand that he would have had a plausible case. But he did nothing of the kind. He took no notice of the matter. He did not say that it was inconvenient for him to attend, and he did not ask the directors to adjourn it. He does nothing at all until this notice convening the extraordinary meeting has been issued and circulated, nor until four days before the meeting. His contention now is that what he calls this irregularity in serving the notice upon him, renders it incompetent for the shareholders to pass the resolution to consider which they have had notice to meet. It appears to me that, if we gave effect to such an argument as this, we should be paralysing the whole course of business of these companies. It is competent for directors to call meetings, it is competent for shareholders to pass resolutions, and the most that can be said here is that there is or may be some irregularity, but an irregularity (if such it be) which can be cured at any moment. In such cases the Court never interferes. I think it is most important that the Court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment. I am not at all sure, having regard to the mode in which, and the short notice upon which, those meetings of directors were held, that this gentleman could have complained of this meeting of directors as irregular, but I will assume that he could. If, at the time of receiving the notice

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of the board meeting, he had said to the secretary that he could not attend as the notice was too short, he might have had some case. I am not prepared, however, to say that in consequence of the shortness of that notice the shareholders were incompetent to pass the special resolution they were convened to consider. If they confirm it to-morrow it appears to me that their doing so will be entirely valid, and I am of opinion that this injunction ought not to have been granted.

LOPES, L.J.:—

I entirely concur, and I can add nothing to what has been said.

Solicitors for Appellants: *Parker, Garrett, & Parker.*
Solicitor for Plaintiff: *W. F. Tarn.*

H. C. J.

C. A. 1887 *Nov.* 1.

In re FITZGERALD'S SETTLEMENT. FITZGERALD *v.* WHITE.

[1887 F. 123.]

Voluntary Settlement—Trust for Accumulation—Trust for benefit of Mortgagees.

By a voluntary settlement certain freehold estates were settled, subject to the mortgages subsisting thereon, to the use of the settlor for life, with remainder to the use of trustees for 500 years, and subject thereto in strict settlement. And the trusts of the term were declared to be that the trustees should during the period of twenty-one years from the death of the settlor receive out of the rents of the estate the annual sum of £1000 and accumulate it at compound interest, and should at the expiration of that period, or from time to time during that period as they might think fit, apply the accumulated fund in satisfaction of the mortgages then charged on the estate, and should pay the surplus of the rents to the person entitled to the immediate reversion of the estate. Seven years after the death of the settlor the first tenant in tail in possession barred the entail and acquired the fee simple subject to the mortgages; and he then claimed the right to stop the accumulations and to receive the accumulated fund and the whole future rents of the estate:—

Held, that the mortgagees were *cestuis que trust* under the deed equally

with the owner of the estate, and that he could not stop the accumulations or receive the accumulated fund without their consent.

The doctrine of *Garrard* v. *Lord Lauderdale* (1) does not apply to provisions for creditors which do not come into operation till after the death of the settlor.

BY an indenture of voluntary settlement dated the 25th of October, 1866, certain freehold estates in the county of *Lancaster* and in *Ireland*, belonging to Mr. *John Purcell FitzGerald*, were limited, subject to the mortgages then affecting the same, to the use and intent that the said *John Purcell FitzGerald* might by deed or will appoint all or any part thereof to any person or persons in fee, or for any term of years, for securing to such person or persons, either beneficially or in trust for such purposes as the said *J. P. FitzGerald* should think fit, sums of money not exceeding in the whole £20,000, with interest at a rate not exceeding 5 per cent., and subject thereto to the use of the trustees of the settlement for ninety-nine years from the date of the settlement, and subject thereto to the use of the said *J. P. FitzGerald* for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of *A. E. Leathes* and *R. H. White* for the term of 500 years from the death of the said *J. P. FitzGerald*, with remainder to the use of *Gerald C. P. FitzGerald*, the eldest son of the said *J. P. FitzGerald*, for life, with remainder to the use of trustees to preserve contingent remainders, with remainder to the use of the first and other sons of the said *Gerald C. P. FitzGerald* in tail male, with remainder to the use of *Maurice N. R. P. FitzGerald*, the second son of the said *J. P. FitzGerald*, for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of the said *Maurice N. R. P. FitzGerald* severally and successively in tail male, with divers remainders over and an ultimate limitation to the right heirs of the said *J. P. FitzGerald*.

The trusts of the term of 500 years were that the trustees should from and after the death of the said *J. P. FitzGerald*, and thenceforth during the period of twenty-one years, yearly and every year, by and out of the rents and profits of the hereditaments and premises, raise the annual sum of £1000 clear of all

(1) 2 Russ. & My. 451.

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deductions whatsoever, and during all or any part of the said period of twenty-one years accumulate the same and the dividends interest and income in the way of compound interest as therein mentioned, and on the expiration of the said period of twenty-one years, or from time to time during the same period as they might think fit, should apply the said annual sum of £1000 and the accumulations thereof in and towards the satisfaction and discharge of all such mortgages or incumbrances as should then be charged upon the said hereditaments or any part of the same; and upon further trust that the said trustees should by and out of the rents and profits of the same hereditaments, or by mortgage of the same or any part thereof for all or any part of the said term, from time to time, when and as any money should be wanted by the said trustees to pay the costs, charges, and expenses of and relating to the transfer of any mortgage or mortgages, or to the release of the said hereditaments from any such mortgage or mortgages, or for such purposes of management as therein mentioned, raise any sum or sums of money which might be required, and apply the same accordingly; and upon further trust to permit the person or persons for the time being entitled to the reversion immediately expectant upon the same term to receive the surplus of the rents and profits of the same hereditaments.

J. P. FitzGerald, the settlor, died on the 4th of May, 1879.

Gerald C. P. FitzGerald, the eldest son of the settlor, died on the 3rd of June, 1879, without having been married.

Maurice N. R. P. FitzGerald, the second son of the settlor, died in the lifetime of his father, leaving children.

His eldest son, *Gerald Purcell FitzGerald*, survived his grandfather, the settlor, and attained his age of twenty-one years on the 3rd of May, 1886.

On the 2nd of June, 1886, he executed a disentailing deed of the English estates comprised in the settlement, and limited them to the use of himself in fee simple subject to the mortgages affecting the same, but freed from all estates tails and remainders, and (as expressed in the deeds) from the trusts of the term of 500 years, and in particular from the trusts for the application of the annual sum of £1000 and the accumulations thereof.

The trustees had accumulated a large sum of money, which was represented by a sum of £8665 Indian 4 per cent. stock. The mortgages amounted to about £60,000.

Gerald P. FitzGerald took out a summons against the trustees of the term of 500 years asking that they might be directed to abstain from accumulating the yearly sum of £1000, and might transfer the fund invested in their names to him.

On the 21st of March, 1887, Mr. Justice *North*, sitting in Chambers, made an order to the effect that the trustees of the term of 500 years held the accumulations standing in their names for the benefit of the mortgagees of the hereditaments comprised in the term, and that it was applicable for the payment off of mortgages, and that the trustees would not be justified in paying it to the Plaintiff, but that it should be offered to the mortgagees successively, and in case of refusal by any of the mortgagees to accept it in reduction of their mortgages, it should be applied by the trustees in payment of any mortgage or incumbrance affecting the estate, or accumulated under the trusts of the term, as the trustees might think best. And he was also of opinion that the trustees were bound to raise the annual sum of £1000 during the remainder of the period of twenty-one years from the death of the settlor and to offer it to the said mortgagees successively, but that if the mortgagees refused to take it in reduction of their mortgages, the trustees might pay any sum of £1000 so raised to the Plaintiff.

From this decision the Plaintiff appealed.

Cookson, Q.C., and *Blakesley*, for the Appellant:—

The learned Judge from whose decision we appeal treated the mortgagees as *cestuis que trust*. This is an erroneous view. The trust for accumulations was not intended for their benefit, nor was any notice of it given to them. They could not have forced the trustees to accumulate the rents in accordance with the trusts of the term. The trust was intended for the benefit of the beneficial owners of the estate; it was an arrangement for regulating the management of the estate, and for relieving the remaindermen from part of the burden of the incumbrances at the expense of the tenants for life. But so far as the mortgagees were

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concerned, it was similar to an agency deed: *Garrard* v. *Lord Lauderdale* (1).

[COTTON, L.J.:—Probably the settlor might have disregarded the trusts, but you are merely claiming under the deed; what equity have you to disregard its provisions?]

There is a trust declared, though not for the mortgagees; and where there is a trust there must be a *cestui que trust.* We say that the remaindermen were the *cestuis que trust;* and now that the Appellant has obtained the absolute interest in the property, he is at liberty to put an end to the trust, as being no longer of any use. Therefore we claim the right to stop the accumulation in future, and to receive the accumulated fund: *Hughes* v. *Stubbs* (2); *Mackinnon* v. *Stewart* (3); *Pearson* v. *Lane* (4); *Synnot* v. *Simpson* (5). Mr. Justice *North* admitted the Appellant's claim as a *cestui que trust* by ordering the future rents to be paid to him if the mortgagees did not wish to receive them. And if he is entitled to that he must be entitled also to the accumulation of previous rents.

Kenyon Parker, for the trustees of the term.

Borrett, for the mortgagees.

The counsel for the Respondents were not called on.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *North,* who declined to authorize the trustees of a settlement executed in 1866 to cease to accumulate as directed by the settlement.

The Appellant here, who was also the Applicant before Mr. Justice *North,* is the present owner of the estate, subject to a term of 500 years, the trusts of which the trustees are asked by him not to execute. The settlor, *John Purcell FitzGerald,* has been dead for some time. He owned large estates, and made a settlement. He retained a life interest in himself, and after his

(1) 2 Russ. & My. 451.
(2) 1 Hare, 476.
(3) 1 Sim. (N. S.) 76.
(4) 17 Ves. 101, 104.
(5) 5 H. L. C. 121.

life interest there was this term of 500 years, and then the estate was settled on his sons as tenants for life, with remainder to their first and other sons in tail. The present Appellant is the person who first became, under the settlement, tenant in tail in possession; and he has executed a disentailing deed.

At the time when the trusts of the term for 500 years, which was to accumulate for the period of twenty-one years after the death of the settlor, arose, there were successive tenants for life, and it is not disputed that during those successive tenancies for life there was a trust which could not be interfered with. But it is said that the sum which was in the hands of the trustees, invested by them pursuant to the directions contained in the settlement, during the successive lives of the tenants for life, is to be handed over to the present owner of the estate, and that the trustees are no longer, as directed by the settlement, to receive £1000 a year, and apply that in payment off of the mortgages, or, if the mortgagees will not take it, from time to time to accumulate it.

One point in Mr. Justice *North's* judgment I cannot agree with, because he has stated that the trustees are *in futuro* to raise the £1000, to offer it to the mortgagees successively, and if none of the mortgagees will take it, then they are to be at liberty to pay it over to the present Applicant. I do not understand that. It is said that although he has upheld the trusts of the term for applying the money for the benefit of the mortgagees, he thinks in future it would be right and reasonable for the trustees to hand over what the mortgagees will not take to the owner of the estate, on the ground that if he does not get it, he could raise a similar sum by mortgage. No doubt he might do so, but he would raise it subject to all the existing mortgages; and if the trust is for the benefit of the mortgagees, I do not see why they are to be deprived of the benefit of the trust, simply because the owner of the estate will be able to raise a similar sum by mortgage of the estates, that is, by adding mortgagees who are not within the trust.

Is it then right that the trust should be considered as liable to be put a stop to by the owner of the estate? I think not. Even if we were to hold that the mortgagees are not to be

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considered in this case *cestuis que trust*, I should feel very great difficulty in authorizing trustees to disregard their trusts, which are clearly declared by the settlement, at the instance, not of the settlor, but at the instance of a person who claims from the bounty of the settlor, just as much as these trusts which are declared as regards the 500 years term originate in the bounty of the settlor. Even if the mortgagees were not *cestuis que trust*, I should myself feel it wrong as a Judge of this Court to direct, at the instance of a person claiming under the settlement, that the trustees appointed by that settlement should disregard what is imposed on them as a duty by the settlor in furtherance of the provisions of the settlement. But I do not decide the case on that ground, although that is my opinion.

But are the mortgagees here to be considered as *cestuis que trust?* Mr. Justice *North* thought they were; and though at first I thought it would be unnecessary for us to decide that point on the ground I have just stated, yet it has been argued very fully and very ably, and I think we ought to decide the question. It is said that the owner of the estate is entitled to say, "Hand over this to me, which can be for nobody else's benefit except mine, who am now the owner of the estate." If he were the owner of the mortgages, that is, if he had paid off the mortgages, and got those vested in himself, he might very well say that. He might say, "I have the mortgages and the estate, and as I am entitled to both I do not desire to have a portion of the rents, which I should receive but for this trust, applied in payment of mortgages which are now vested in me." That is not the state of things. There are mortgages to the extent of £60,000 still remaining outstanding. He takes the estate by limitation, in obedience to the settlor, subject to this term. Is there a trust in favour of anybody else? It could not be denied that during the lifetime of the tenants for life there was a good trust. The Appellant would say that it was a trust for his benefit ultimately; but in my opinion it would not only be that, though that was probably one of the objects of the settlor, but a trust also for the benefit of the mortgagees, so that they should not be put into the position of being obliged to become mortgagees in possession, which every one knows is a most inconvenient and perilous position.

In my opinion there is a declaration in this settlement that one of the objects of the settlor's bounty is that a provision should from time to time be made out of rents to pay off as far as it would pay the mortgages on the estate without putting the mortgagees to the necessity of enforcing their rights by foreclosure, or sale, or by becoming mortgagees in possession of the estate. We must observe that this trust is not a provision to take effect during the lifetime of the settlor as to how his property is to be dealt with during his lifetime, but a direction as to what is to be done with the estate after his death; and we find in it a benefit for the mortgagees just as much as a benefit for the tenants for life, and just as much as a benefit for the ultimate remainderman, which the Appellant now is.

Lord *Cranworth* in the case of *Synnot* v. *Simpson* (1) does intimate a doubt whether the doctrine of *Garrard* v. *Lord Lauderdale* (2) that there are no *cestuis que trust*, because those who have the property vested in them may be looked on as agents for the settlor, will apply where trusts are to take effect only after the death of the settlor. In such a case it appears from the mere fact that it is a direction to take effect when he is not able to recall the direction, that it is not intended that the trustees who have the estate should be mere agents; it is not intended that they should have no duty or trust for any one else; because the trusts are to take effect when he is dead and is no longer able to call on the trustees to reconvey the property to him. I think this case is a good illustration of the doctrine, because here the trusts of the term are entirely to arise after his death. What does that shew? It shews that he is intending a benefit in the first instance by way of accumulation of £1000 a year for the benefit of all it could benefit—for the ultimate remainderman, so long as the estate is only in reversion, and also, both after and before the estate came into possession of the remainderman, for the benefit of the mortgagees.

In my opinion, therefore, we ought to say that these mortgagees are persons constituted by this settlement objects of the settlor's bounty; and if that is so they are to be considered as *cestuis que trust* under this deed. It is very true they are not

(1) 5 H. L. C. 141. (2) 2 Russ. & My. 451.

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named, but they are persons who can be ascertained, and, as that is so, no difficulty arises from the fact that they are a number of persons not named in the deed. Their position is indicated, so that when it becomes necessary to determine who are *cestuis que trust* they can be ascertained. If they are *cestuis que trust* then they would be entitled, if their trust was attacked, to insist on it and enforce it just as much as any other *cestuis que trust*.

In my opinion the decision of Mr. Justice *North* was right, subject to this qualification, that we ought to alter the latter part of the order and direct the trustees if none of the mortgagees will receive the £1000 a year, to invest it and accumulate it according to the trusts of the term of 500 years.

LINDLEY, L.J.:—

I am of the same opinion. The settlor in this case was a gentleman named *John Purcell FitzGerald;* and, under the settlement, he reserved to himself a life interest. Then he says what the trusts of the term are to be and the trusts are that as soon as he is dead, but not before, the rents are to be set apart and accumulated or applied in paying off the mortgages on the estate. It so happens that the intermediate life estates have all disappeared, and that one gentleman, the present Appellant, has become entitled to the property subject to the trusts of this term. He says the trusts of that term are trusts which are entirely for his benefit, and he wants them discharged. He says, "I do not want this accumulation to go on any longer, I want the £1000, I will take care of the mortgages." Now if it were true that he is the only *cestui que trust*, there would be some difficulty in saying that his position was not a tenable one. But to say that he is the only person interested in the trusts of the term begs the whole question. It appears to me, I confess, that this is not like the case of *Garrard* v. *Lord Lauderdale* (1); because these trusts are to commence only when the settlor is dead. The true view to take is that the *cestuis que trust* (I do not say the sole ones) are the mortgagees, and that they are really *cestuis que trust*, and entitled to the benefit of the trust. If Mr. *Fitz-Gerald*, the Appellant, could obtain the concurrence of the mort-

(1) 2 Russ. & My. 451.

gagees, or could obtain a release by the mortgagees of their interest in this term, then, having got the consent of the representatives of the settlor and his own, he would be, as we are asked to say he is now, the only person interested in the matter. But the mortgages are outstanding, and if the mortgagees desire to have the benefit of this term they are entitled to it.

I confess I do not follow the view of Mr. Justice *North* when he made it a part of his order that the £1000 might be paid to Mr. *FitzGerald* if the mortgagees did not care to have it. I agree with Lord Justice *Cotton* in the observations he made on that subject, and it appears to me the proper order to make is that the trusts must be carried out, and that part of Mr. Justice *North's* order must be varied.

LOPES, L.J. :—

It is admitted in this case that if the mortgagees are *cestuis que trust*, the Appellant fails. Now if the settlor intended to benefit the mortgagees, if he intended them to be the objects of his bounty, it is also admitted that they would be *cestuis que trust.* This case, therefore, depends entirely on what the true construction of this provision is. I think that what the settlor intended was not only to benefit the estate—although that probably may have been one of his main objects—I think he also intended to benefit the mortgagees, and I think if the effect of that provision is considered it is pretty clear that must be so. What does he do by that provision ? He provides that at the end of twenty-one years there shall exist a fund out of which these mortgage debts, or at any rate a considerable portion of these mortgage debts, should be paid. In point of fact he provides an additional security out of which these mortgage debts are to be paid. It seems, therefore, impossible to say that he did not intend to benefit, and did not benefit, the mortgagees. It is perfectly clear that he intended to, and did.

Mr. Justice *North* by his order seems to have thought that if the mortgagees did not care to have this £1000, which was to be raised out of the rents, it might then be applied to the purposes of the Appellant. I venture to think he was wrong in that view. It seems clear that that sum could not be applied or handed over

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to the Appellant, but that it must be accumulated according to the terms of the provisions of the deed. I think the Appellant is not entitled to have this provision set aside, and that it ought to stand.

Solicitors for all parties: *White, Borrett, & Co.*

M. W.

C. A. 1887 *Nov.* 4.

In re CLAYTON MILLS MANUFACTURING COMPANY.

Practice—Leave to appeal after Time.

Three of six directors sold their shares to the company and received the price out of the funds of the company. In the winding-up of the company an order was made upon the six directors jointly and severally to replace these sums, with liberty to the three who had not received them to apply as to the liability of those who had. On the last day for appealing the three who had received the sums appealed from the order, without the knowledge of the other three:—

Held, that leave to appeal after time ought to be given to the other three.

ON the 26th of July, 1887, an order was made by Mr. Justice *North* under sect. 165 of the *Companies Act*, 1862, that *Hindle, J. Birtwhistle, Sharples, Holden, Goodier, W. Knowles, Shaw, R. Birtwhistle, H. Mercer*, and *A. A. Mercer* should jointly and severally pay to the official liquidator £300, part of a sum paid to *H. Mercer* in January, 1882, by the company, in purchase of *H. Mercer's* shares; and £300, part of a sum paid to *A. A. Mercer* on the same day by the company, in purchase of *A. A. Mercer's* shares; and that *Hindle, J. Birtwhistle, Sharples, Holden, Goodier, W. Knowles, Shaw* and *R. Birtwhistle* should jointly and severally pay to the official liquidator £300, part of a sum paid by the company in February, 1882, to *R. Birtwhistle* in purchase of *R. Birtwhistle's* shares in the company. And that *Hindle, J. Birtwhistle, Sharples, Holden, Goodier, W. Knowles, Shaw*, and *James Knowles* should jointly and severally pay to the official liquidator £250, paid by the company in June, 1884, to *Shaw* in purchase of his share and interest in the company. It was ordered that *J. Birtwhistle, Sharples* and *Goodier* "be at liberty to apply to

the Judge in Chambers as to the liability of any person to whom they have given notice under Order XVI., rule 55."

The persons served with notices under Order XVI. were the persons who had received the three sums of £300 and the £250.

J. Birtwhistle, Sharples, Goodier and *W. Knowles* were present directors of the company. The other parties were past directors. *H. Mercer, A. A. Mercer, R. Birtwhistle* and *Shaw* had ceased to be directors on the occasion of the purchases of their shares referred to in the order.

On the 7th of September, 1887, the last day of the time allowed for appealing against the order, *H. Mercer, A. A. Mercer* and *R. Birtwhistle*—the persons who had received the sums of £300 from the company—appealed against so much of the order as directed payment of those sums. On the 26th of October, 1887, *A. A. Mercer* abandoned the appeal, which was continued by *H. Mercer* and *R. Birtwhistle.*

On the 29th of October, 1887, *J. Birtwhistle, Sharples* and *Goodier* gave notice of motion for leave to appeal against the order of the 26th of July, or that they might be at liberty to appear on the appeal of *H. Mercer, A. A. Mercer* and *R. Birtwhistle,* and oppose it. They deposed that they had not been served with notice of that appeal, and did not know of the intention to present it until the time for appealing had expired.

J. Birtwhistle, Sharples and *Goodier* had on the 14th of October paid to the official liquidator the £250 payable in respect of *Shaw's* share. *Shaw* had become bankrupt.

Everitt, Q.C., and *E. Ford*, for the application :—

Mr. Justice *North* considered this case to be governed by *Trevor* v. *Whitworth* (1), and made the present Applicants and the other persons who were directors at the time of the purchases on behalf of the company of the shares of retiring directors, jointly and severally liable for the three sums of £300 and the sum of £250, which sums, if the case was not distinguishable, were improperly paid out of the funds of the company. The present Applicants considered that the persons who received those sums were primarily liable, and liberty was given to apply for the purpose of claiming

(1) 12 App. Cas. 409.

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indemnity. The persons primarily liable gave notice of appeal on the last day on which they could do so, and without giving notice to us, or making us parties to the appeal. If their appeal is successful we shall be left liable to pay unless leave to appeal is given us. It would be a monstrous result that the persons who received the money should be enabled to keep it, and that we, who only concurred in their receiving it, should remain liable to refund it. *Ex parte Hayward* (1) is very analogous to this case.

Cozens-Hardy, Q.C., and *S. Hall*, for the liquidator:—

That an appeal after time may be allowed there must be something raising an equity against the respondent. Here there is nothing that tends that way. The Applicants seem not to know what line they are going to take—they ask for leave to appeal or to appear on the existing appeal and oppose it. We do not object to the latter alternative.

[LINDLEY, L.J.:—We cannot adopt that, as the Appellants are not here.]

One Appellant has already withdrawn the notice of appeal, so a difficulty exists already in working out the rights of the parties. This is not a case of clear right to indemnity. The persons against whom the order has been made are all wrongdoers, and it has never been decided that the Applicants have any right of indemnity as against the other wrongdoers.

LINDLEY, L.J.:—

By an order of Mr. Justice *North* the Applicants and several other persons, all being directors or late directors of the company, were declared jointly and severally liable to pay three sums of £300, which were held to have been improperly paid out of the assets of the company for the purchase of the shares of three of the late directors, who are among the persons against whom this order was made, also a sum of £250 paid on the purchase of the shares of another director. The present Applicants have paid the £250, and as to that there is no appeal nor any application

(1) Law Rep. 6 Ch. 546.

for leave to appeal. On the last day for appealing the three persons who had received the sums of £300 in respect of their shares appealed against the order, but one of them has since withdrawn from the appeal. If the present application is not granted, then if the appeal succeeds there will be this paradoxical result, that the persons who *primâ facie* are primarily liable will get off, and the persons who *primâ facie* are only secondarily liable will have to pay. This would not be just. I think that leave to appeal ought to be given on the terms of the Applicants paying the £900 to the liquidator, he undertaking to refund it if the appeal is successful.

LOPES, L.J.:—

I am of the same opinion.

Solicitors for liquidator: *Rowcliffes, Rawle, & Co.*, agents for *Addleshaw & Warburton, Manchester.*

Solicitors for applicants: *Pitman & Sons*, agents for *James Clarke, Preston.*

H. C. J.

KAY, J.
1887
Oct. 29.

In re CAMERON AND WELLS.

Settlement—Voluntary Conveyance—Marriage Consideration—Settlement on Marriage of Widower—Limitation in favour of Children by former Wife—Subsequent Mortgagee—27 Eliz. c. 4 [Revised Ed. Statutes, vol. i., p. 649.]

The principle of *Newstead* v. *Searles* (1), whereby limitations contained in the marriage settlement of a widow in favour of her children by a former marriage are not treated as voluntary, will not be extended to the like limitations in the marriage settlement of a widower.

By the settlement made on the second marriage of a widower, land belonging to him was conveyed in trust for his children by his first wife absolutely, and personalty belonging to the second wife was settled on trusts for her benefit. The husband afterwards mortgaged the land:—

Held, that the settlement of the land was voluntary, and therefore void as against the mortgagee under 27 Eliz. c. 4.

Adjourned Summons.

By an indenture of settlement dated the 24th of December, 1879, and made between *John Ellis* (who was a widower) of the first part, *Jane Owen* of the second part, and trustees of the third part, reciting that a marriage was intended to be solemnized between *John Ellis* and *Jane Owen*, that *John Ellis* was seised of the freehold hereditaments intended to be thereby granted for an estate of inheritance in fee simple, that *Jane Owen* was possessed of personal estate and stock-in-trade, and that upon the treaty of the said intended marriage it was agreed that the said respective properties and premises should be assigned in manner thereinafter appearing "in order to provide for the children of the said *John Ellis* by his first wife," in consideration of the premises and of the intended marriage certain freehold hereditaments were conveyed by *John Ellis* and *Jane Owen* to the trustees in trust after the solemnization of the marriage for the children of *John Ellis* by his first wife, share and share alike as tenants in common, and by the same deed the personal property of *Jane Owen* was assigned to be held in trust for her, to dispose of as she might by will direct, and if she should die intestate the

(1) 1 Atk. 265; West, Ch. 287; 9 App. Cas. 320, n.

same to go to her next of kin, share and share alike as tenants in common.

The marriage of *John Ellis* and *Jane Owen* was shortly afterwards duly solemnized.

By an indenture of mortgage dated the 10th of July, 1880, *John Ellis* mortgaged the freehold hereditaments comprised in the settlement to *D. Cameron* to secure £500 and interest.

In April, 1887, *D. Cameron*, in exercise of the power of sale contained in the mortgage, caused the mortgaged property to be put up for sale. *J. Wells* was a purchaser at such sale.

By his requisitions on title *J. Wells* objected that the deed of the 24th of December, 1879, was not voluntary as regarded the children of the first marriage of *John Ellis*, and declined to proceed with his purchase on the footing that such deed was voluntary. The vendor insisted that the deed was voluntary, and that he could make a good title.

This summons was taken out by *J. Wells*, the purchaser, under the *Vendor and Purchaser Act*, 1874, asking that it might be declared that his requisitions and objections in respect of the title had not been sufficiently answered or complied with, and that he might be discharged from his contract.

The summons was adjourned into Court, and now came on for argument upon the question whether or not the settlement of the 24th of December, 1879, was voluntary as regarded the children of *John Ellis* by his first wife.

It did not appear that any pecuniary or other consideration for the settlement was given by any of such children.

Renshaw, Q.C., and *J. Maurice Lloyd*, for the purchaser:—

The settlement of the 24th of December, 1879, was not a voluntary conveyance of land within the meaning of 27 Eliz. c. 4, and was therefore valid as against the subsequent mortgagee of the settlor. It is true that the children of *John Ellis* by his first wife were not within the consideration of his second marriage, but they were within the consideration for the settlement. There was ample consideration for it; property both of the husband and of the wife was settled; and the wife, by concurring, gave up her right to dower in the lands settled by the husband. The

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children by the first marriage could have enforced the contract: *Gandy* v. *Gandy* (1); and they cannot be treated as volunteers.

[KAY, J., referred to *Taylor* v. *Beech* (2), *Surcome* v. *Pinniger* (3), and *Davenport* v. *Bishopp* (4).]

In *Newstead* v. *Searles* (5) a settlement made by a widow, about to take a husband, upon the children of her former marriage was upheld by Lord *Hardwicke* against a subsequent mortgagee. That case has been followed in *Clarke* v. *Wright* (6) and *Gale* v. *Gale* (7), and treated as law in *Mackie* v. *Herbertson* (8). The principle is that a provision in a marriage settlement in favour of existing children cannot be deemed fraudulent under the Statutes of *Elizabeth*, and that principle must apply as much to the children of a widower as to those of a widow. In *Clarke* v. *Wright* Mr. Justice *Blackburn* (9) treats *Newstead* v. *Searles* as deciding that all limitations shewn not merely to be included in the marriage settlement, but to be part of the marriage contract, may be supported.

[KAY, J.:—The principle of *Newstead* v. *Searles* has never been extended beyond the case of the marriage of a widow. His Lordship referred to *French* v. *French* (10), and to Lord *St. Leonards'* Vendors and Purchasers (11).]

Reference was also made to *Davidson's* Conveyancing (12), where the cases are collected.

Bardswell, for the vendor:—

The settlement on the children of the first marriage of *John Ellis* was voluntary, and therefore void as against the subsequent mortgagee under 27 Eliz. c. 4. There was no consideration moving between the husband and wife in favour of these children, nor did any consideration move from the children. No doubt as between the husband and wife there was ample con-

(1) 30 Ch. D. 57.
(2) 1 Ves. Sen. 297.
(3) 3 D. M. & G. 571.
(4) 1 Ph. 698.
(5) 1 Atk. 265; West Ch. 287; 9 App. Cas. 320, n.
(6) 6 H. & N. 849.
(7) 6 Ch. D. 144.
(8) 9 App. Cas. 303.
(9) 6 H. & N. 867.
(10) 6 D. M. & G. 95.
(11) 14th Ed. p. 712.
(12) Vol. iii. 2nd Ed. p. 833; 3rd Ed. p. 670.

sideration; but that does not touch the question whether the objects of the settlement took for valuable consideration or as volunteers.

The case is governed by the decision of Vice-Chancellor *Hall* in *Price* v. *Jenkins* (1), who declined to extend the principle of *Newstead* v. *Searles* (2) to the case of a settlement made on the occasion of the second marriage of a man in favour of his issue by the former marriage, and held that the limitation in their favour was void as against a subsequent purchaser from their father. It is true that this decision was reversed on appeal (3), but the Court of Appeal said that they gave no opinion upon this point. In *Dart's* Vendors and Purchasers (4) it is questioned whether the principle of *Newstead* v. *Searles* applies where the husband is the settlor; and in *Gale* v. *Gale* (5) Mr. Justice *Fry*, in following *Newstead* v. *Searles*, said that his decision had nothing to do with the case of a husband making a provision for his children by a former wife.

Renshaw, in reply.

KAY, J.:—

In this case the question, which is one of very considerable interest, arises in this way. On the marriage of *John Ellis* to a lady, who had some property of her own, a settlement was made, which is in a very short form. [His Lordship read the material parts of the settlement of December, 1879, and continued:—] After that the husband mortgaged the property which he had so settled upon the children of the first marriage, and the question is whether, under the statute 27 Eliz. c. 4, that mortgage can prevail against the children of the first marriage.

Undoubtedly the ordinary rule is that a settlement of that kind is voluntary as to every one who does not come, as it is phrased, within the marriage consideration, and the only persons who come within the marriage consideration, that is, the only persons from whom it is assumed that consideration moves, are

(1) 4 Ch. D. 483, 488.
(2) 1 Atk. 265; West Ch. 287; 9 App. Cas. 320, n.
(3) 5 Ch. D. 619.
(4) 5th Ed. pp. 896, 897.
(5) 6 Ch. D. 144, 152.

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1887
In re CAMERON AND WELLS.

the husband, the wife, and the children of the marriage. The phrase that they "come within the marriage consideration" means that they must be treated as persons from whom consideration moves for the settlement. If there is in the settlement a limitation in favour of collaterals, no consideration moves from those collaterals, unless they settle property of their own. Collaterals, therefore, generally speaking, are not within the consideration for a marriage settlement; and when it is said that collaterals are not within the marriage consideration, this is, in truth, an expansion of the phrase that no consideration moves from the collaterals, and therefore, so far as they are concerned, the interest given by the settlement to them is by way of voluntary gift. As between the husband and wife it is not a voluntary gift; there is ample consideration as between them for every provision contained in the settlement, but that does not make the collateral any the less a volunteer. According to the case of *Davenport* v. *Bishopp* (1) the settlement is a contract between the husband and wife; they can enforce it, and when it is enforced the collaterals get the benefit of it. So, also, if there be an executed settlement, as this was, the volunteer can assert and enforce the trust in his favour; but still he is only a volunteer, and if the settlement is impugned either under 13 Eliz. c. 5, by creditors of the settlor who were creditors at the date of the settlement, or under the statute of 27 Eliz. c. 4, by a purchaser for value in the case of lands, then the collateral is treated, for the purposes of those statutes, as being only a volunteer, and the ordinary principle, which has been adopted rather by addition to the words of the statute than otherwise, that every voluntary settlement shall be deemed to be fraudulent and void, applies. But it is said that there is an exception to this principle when a widow provides by such a settlement for her children by a former marriage. How those children are any less volunteers than any other stranger to the marriage consideration I confess I am entirely unable to see. No consideration moves from them. It is impossible to say that they are within the consideration of the second marriage of the widow. But undoubtedly in the case of *Newstead* v. *Searles* (2), a decision pronounced very

(1) 1 Ph. 698. (2) 1 Atk. 265; West, Ch. 287; 9 App. Cas. 320, n.

long ago by a great Judge, Lord *Hardwicke*, some kind of exception was made in favour of the children of a widow who are included in the limitations under a settlement made on her subquent marriage. I do not profess to understand it, and I may say so without much reluctance because, observing the decisions which have been based upon that one, I do not find that the reasons given in explanation of it have always been consistent. Lord *Selborne*, in the recent case of *Mackie* v. *Herbertson* (1), gave a very ingenious reason, namely that in *Newstead* v. *Searles* (2) the children were to take *pari passu* with the children of the marriage which was then being contracted, and therefore were so complicated and mixed up with those children that their number determined the shares of those children. That is a very ingenious reason, but whether that was the reason which Lord *Hardwicke* had in his mind may be doubted. In *Clarke* v. *Wright* (3) no such reason seems to have been given, but the case of *Newstead* v. *Searles* was treated as an absolute authority for the proposition that the children of a widow, at all events, taking under a marriage settlement were not to be considered volunteers, although every other collateral might be. I confess myself unable to understand that. It seems to me that any bargain which may be made between the husband and wife in favour of the children of a former marriage of the wife has no more to do with the matter than it would have in the case of any other collateral whatever. When any collateral takes an interest under a marriage settlement, it may be the bargain between the husband and wife that the collateral should so take; but that does not make him any the less a volunteer, because no consideration moves from him, which is the test whether the interest of the collateral is or is not that of a volunteer.

But then it is said that this exception has never been extended to the case of the children of the husband, and that there is a distinction between the children of a widower by his former marriage and the children of a widow by her former marriage. I confess I do not see why there should be any such distinction. It is suggested that there might be a distinction in a case where

(1) 9 App. Cas. 303, 336, 337.
(2) 1 Atk. 265; West, Ch. 287; 9 App. Cas. 320, n. (3) 6 H. & N. 849.

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the widower takes nothing whatever from the intended wife; but if a settlement on his children be a part of the bargain by which property both of the intended husband and of the intended wife is settled, why should not that be a bargain for value between the husband and the wife? I confess I do not see why it should not. Suppose that only property of the intended husband was settled, and that it was settled upon his children by a marriage settlement, reciting that, in consideration of the marriage, the husband and wife agreed that the husband's property should be settled on his children, why should not that be a valuable consideration as between those two? No one could doubt that it was so, because the marriage proceeds on the faith of the contract being carried out. But then how does that make the children of the husband anything but volunteers? As between them and the husband and wife no consideration moves from them. I see no distinction in the world for the purposes of this case between the children of the husband and those of the wife. But I confess myself unable to understand any intelligible principle under which the children of the intended wife by a former marriage taking under a settlement such as this are anything but volunteers. There has, however, been this exception introduced in their favour very long ago and by a great judge. Mr. Justice *Williams*, in his judgment in *Clarke* v. *Wright* (1), said that *Newstead* v. *Searles* (2) was decided before the principles of law were well understood. Still that decision has been adopted and followed, so far as I know, ever since, but only in the case of children of the intended wife. I am asked to apply it to children of the intended husband, but I find that in the case of *Price* v. *Jenkins* (3) Vice-Chancellor *Hall* distinctly refused to apply the doctrine to children of the intended husband; and in *Gale* v. *Gale* (4) Mr. Justice *Fry*, following *Newstead* v. *Searles*, and applying the doctrine to children of the intended wife, says: "My decision has nothing to do with the case of the husband making a provision for his children by a former wife, as to whom Mr. *Dart* suggests that the same

(1) 6 H. & N. 849, 882.
(2) 1 Atk. 265; West, Ch. 287; App. Cas. 320, n.
(3) 4 Ch. D. 483.
(4) 6 Ch. D. 152.

considerations do not apply." Therefore I presume that other judges were in the same mental condition upon the point as I am; they did not thoroughly understand how the exception in the case of the children of the wife came to be introduced, and, not understanding, they declined to carry it further by applying it to the children of the husband. That is a state of authority which, though I think it a lamentable one, I am bound to regard. I therefore hold that this settlement is voluntary as regards the children of the husband by his former marriage, and that the mortgage is good as against them.

Solicitors: *Peacock & Goddard*, agents for *J. Lloyd Griffith, Holyhead*; *Jaques & Co.*, agents for *Glynne Jones & Jones, Bangor.*

C. C. M. D.

NORTH, J.

1887

July 22.

In re ELEY.

[1887 E. 172.]

Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order, August*, 1882, *Sched. I., Part I.—Mortgage—Negotiating Fee.*

A solicitor mentioned to a borrower the name of a client of his as likely to lend. A mortgage was arranged without further action on the part of the solicitor, who then acted for both parties in the matter of the mortgage:—*Held*, that the solicitor was not entitled to a negotiating fee.

THIS was a summons to obtain taxation of a solicitor's bill of costs which had been paid on the ground that there were special circumstances under which the bill was paid. The applicant, *T. W. Rumming*, in exercise of an option, purchased from *William Johnston* and *George S. Miller* certain freehold premises of which he held a lease. *William Eley* acted as solicitor for the vendors in deducing the title and perusing and completing the conveyance. *Miller*, one of the vendors, lent £800 to *Rumming*, the purchaser, and took a mortgage of the premises at the time the conveyance was completed. *Eley* acted for both parties in the matter of the mortgage. *Rumming* paid *Eley* a sum of £21 on an account rendered, including £8 "charge for negotiating and preparing mortgage for £800 as per scale," and £1 for stamp.

A question was raised on the summons whether under the circumstances stated below *Eley* was entitled to a negotiating fee as mortgagor's solicitor by virtue of Sched. I., part I. of the General Order of August, 1882, made in pursuance of the *Solicitors' Remuneration Act*, 1881.

On the 17th of August, 1886, while the completion of the purchase was pending, *Rumming* and *Eley* had an interview, at which conversation took place as to the obtaining a loan on mortgage of the property. There was a conflict of evidence as to whether *Miller's* name was then mentioned as a probable mortgagee. In December, 1886, *Rumming* called on *Miller* and asked for a loan of £1100, and after some discussion it was agreed between *Rumming* and *Miller* that the latter should advance the £800, which was ultimately lent. The transactions were completed on the 6th of January, 1887.

H. Terrell, for the Applicant:—

As to the charge for negotiating it is quite clear that the utmost the solicitor did was to mention to the borrower that his client might lend the money required, he did no work in negotiating, and the charge for doing so is wrong.

Byrne, for *Eley*:—

The negotiation was begun by the solicitor, he did what was the important part of the negotiation, he found the borrower a lender, and found the lender a borrower; he is entitled to be paid in the same way as an auctioneer or other agent is entitled to his commission for introducing the parties to a transaction, though the terms are settled without him.

NORTH, J.:—

One of the charges made is for negotiating. Now it is quite clear to me that Mr. *Eley* was not entitled to charge for negotiating the mortgage for £800. I have no doubt that he did in August mention *Miller* to Mr. *Rumming* as a person who might lend, but I am clear nothing was said as to the amount or terms.

Nothing further was done till December when *Rumming* saw *Miller*, and after some discussion as to terms the loan was arranged. In my opinion the part the solicitor took was not such as to entitle him to make any charge for negotiating. I consider that such cases as those of an auctioneer have nothing to do with the present. They turn on different considerations, such as the custom of the trade; nothing of that sort is applicable to a charge made by a solicitor. And the matter does not stop there, for the regulations affecting the scale in Sched. I. part I., though not exhaustive, quite sufficiently make it clear that the solicitor is not entitled to charge for negotiating for merely introducing a lender. Of the rules appended to that part of that schedule, rule 11 provides "the scale for negotiating . . . as to a mortgagee's solicitor, it shall only apply to cases where he arranges and obtains the loan from a person for whom he acts."

[His Lordship decided that there were such special circumstances connected with the payment of the bill as to preclude

NORTH, J. 1887 *In re* ELEY.

the client from the taxation to which he would otherwise have been entitled.]

Mr. *Eley* appealed from this decision; and the appeal came on to be heard on the 25th of October, 1887. But the Appellant not appearing, the appeal was dismissed with costs.

Solicitors: *J. A. Neale*; *W. Eley.*

D. P.

NORTH, J. 1887 *Oct.* 25.

BEST *v.* APPLEGATE.

[1886 B. 5773.]

Practice—Mortgage—Foreclosure—Order for delivery of Possession—Rules of Supreme Court, 1883, *Order* XVIII., *r.* 2; *Order* LV., *r.* 5*a* (*Dec.* 1885).

An order for foreclosure absolute in a foreclosure action commenced by summons, may, as against the defendant mortgagor in possession (he having been served and not appearing) include an order for delivery of possession by him to the plaintiff, even though the summons did not ask for delivery of possession.

Salter v. *Edgar* (1) and *Lacon* v. *Tyrrell* (2) followed.

MOTION by the Plaintiff, a mortgagee of leaseholds, asking that an order for foreclosure in default of payment by the Defendants, dated the 4th of August, 1887, might be made absolute, and that two of the Defendants (two of the mortgagors) who were in possession or occupation of part of the mortgaged premises might be ordered to deliver up possession of that part to the Plaintiff.

The action was commenced by originating summons on the 4th of December, 1886. On the 13th of January, 1887, *North*, J., at Chambers, made an order that, in default of payment by the Defendants to the Plaintiff of the sum of £2073 9*s.* and his taxed costs of the action (including any costs properly incurred by him as mortgagee), and any sum which the Plaintiff might thereafter properly pay for ground rents in respect of the mortgaged premises, on or before the 13th of July, 1887, the Defendants should be foreclosed. And, the Defendants consenting, a receiver was

(1) W. N. 1886, p. 47. (2) W. N. 1887, p. 71.

appointed to receive the rents and profits of the mortgaged premises.

The Defendants made default, and on the 4th of August, 1887, upon a motion by the Plaintiff in Court, *North*, J., made an order enlarging the time for redemption until the 2nd of September, 1887. And it was ordered that the receiver should pay the sum of £39 8*s.* 4*d.*, which was in his hands, to the Plaintiff on account of the £2073 9*s.*, and that on such payment the receiver should be discharged. And it was ordered that, in default of payment by the Defendants, or some or one of them, to the Plaintiff of the sum of £2077 1*s.* 10*d.* on the 2nd of September, 1887, the Defendants should be absolutely foreclosed. The sum of £2077 1*s.* 10*d.* was made up of £2034 0*s.* 8*d.* (the balance of the £2073 9*s.* after deducting the £39 8*s.* 4*d.* received by the receiver), £29 17*s.* 2*d.* (the amount of the Plaintiff's taxed costs), and £13 4*s.*, which the Plaintiff had paid for ground rents since the date of the order of the 13th of January, 1887. The Defendants made default, and on the 14th of October the Plaintiff gave notice of the present motion.

The Defendants had been served, but they did not appear.

Jason Smith, for the Plaintiff:—

[NORTH, J., inquired whether the summons asked for an order for delivery of possession.]

I have not a copy of the summons. But it has been held that, in an action for foreclosure commenced by writ, when default has been made in redeeming the mortgaged property, an order for delivery of possession by a mortgagor who is in possession may be made when he has been served, though he does not appear, even if neither the writ nor the statement of claim has asked for an order for delivery of possession: *Salter* v. *Edgar* (1). A similar order was made in *Lacon* v. *Tyrrell* (2), in which case the proceedings were commenced by originating summons, and the summons did not ask for delivery of possession. It is a mere matter of form, and a summons can be amended at any time. The Court has jurisdiction, and will not put the Plaintiff to the expense of bringing an action of ejectment.

(1) W. N. 1886, p. 47. (2) W. N. 1887, p. 71.

NORTH, J. 1887 BEST v. APPLEGATE.

NORTH, J.:—

I do not quite understand those cases. I have some difficulty in seeing what jurisdiction there is to make an order for delivery of possession when the summons does not ask for it. But I will follow the cases cited, if the Registrar, on looking at the records in them, shall find that they are in point.

Solicitors: *Morten, Cutler, & Co.*; *H. R. Elton.*

W. L. C.

[By the kindness of the Registrar the reporter has seen a copy of the writ in *Salter* v. *Edgar* (1), and a copy of the summons in *Lacon* v. *Tyrrell* (2), and has ascertained that neither the writ in the first case nor the summons in the second case asked for delivery of possession.]

NORTH, J. 1887 *Oct.* 25.

In re JACKSON AND WOODBURN'S CONTRACT.

[1887 J. 181.]

Vendor and Purchaser—Summons—Jurisdiction—Determination of Validity of Notice to rescind Contract—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 9 [*Revised Ed. Statutes, vol. xvii., p.* 289].

Upon a summons under sect. 9 of the *Vendor and Purchaser Act*, 1874, the Court has jurisdiction to determine the validity of a notice given by a vendor to rescind his contract for sale.

Such a question is not "a question affecting the existence or validity of the contract" within the meaning of sect. 9, those words referring only to the inception of the contract.

SUMMONS under the *Vendor and Purchaser Act*, 1874.

On the 13th of October, 1886, a contract for the sale of real estate was entered into between *R. B. Jackson* (the vendor) and *Adam Woodburn* (the purchaser).

The contract contained the following conditions (*inter alia*):—

No. 7. "If the purchaser shall insist on any objection or requisition as to the title, or abstract, or evidence of title, particulars,

(1) W. N. 1886, p. 47. (2) W. N. 1887, p. 71.

conditions, conveyance, surrender, or otherwise (not being a claim for compensation falling within the 10th of these conditions), which the vendor shall be unable, or, on the ground that the expense would be unreasonably heavy, unwilling to remove or comply with, the vendor may by notice in writing, to be given to the purchaser, or his solicitor, at any time, and notwithstanding any negociation or litigation in respect of such objection or requisition, or any attempt to remove or comply with the same, rescind the contract, unless, within fourteen days after the delivery of such notice, the purchaser shall, by notice in writing, withdraw such objection or requisition, and upon such rescission, the deposit shall be returned to the purchaser, but without any interest, cost of investigating the title, or other compensation or payment whatever."

No. 10. "If any error or mistake shall appear to have been made in the description of the property, or the vendor's interest therein, the same shall not annul the sale, but, if the same shall be pointed out either by the vendor or purchaser prior to the time appointed for the completion of the purchase, compensation shall be allowed or given by the vendor or purchaser as the case may require."

There was this further special condition: "The timber and coppice have been valued by Mr. *George Barker*, woodmonger, that on Lot 1 at £180; that on Lot 3 at £10; and that on Lot 4 at £80; and that sum shall be paid by the purchaser of each lot in addition to his purchase-money."

The purchaser contracted to purchase Lots 1, 3, and 4. He afterwards required compensation from the vendor for an alleged deficiency in the acreage of the property, and on the ground that the valuation of the timber was excessive. The vendor declined to comply with this requisition, and on the 29th of December, 1886, gave notice to rescind the contract.

On the 10th of February, 1887, the present summons was issued by the purchaser, asking (*inter alia*) for (1), a declaration that the vendor was not entitled to rescind the contract; (2), a declaration that the purchaser was entitled to compensation in respect of the deficiency in the quantity of the land comprised in the contract; (3), a declaration that the purchaser was entitled

NORTH, J. 1887 *In re* JACKSON AND WOODBURN'S CONTRACT.

to compensation in respect of the timber on the land being of less value than the sum mentioned in the contract.

The summons came before the Chief Clerk in Chambers, and was adjourned at once to the Judge without any discussion.

Levett, for the purchaser.

T. L. Wilkinson, for the vendor:—

There is a preliminary objection to the summons. Sect. 9 (1) of the *Vendor and Purchaser Act*, 1874, gives no jurisdiction to decide such a question on a summons. The question whether the vendor was entitled to rescind the contract is one "affecting the existence of the contract," and is, therefore, within the exception in sect. 9.

Levett, for the purchaser:—

The Court of Appeal has held that similar questions may be decided on a summons. Moreover, it is too late to raise the objection after the vendor has filed affidavits on the summons. The objection should have been raised before the Chief Clerk in Chambers. It is admitted that the contract was valid in its inception, and, if it has come to an end, it has done so only by virtue of a provision contained in the contract itself. The extent of the jurisdiction on summons is shewn by *In re Yeilding and Westbrook* (2), and *In re Hargreaves and Thompson's Contract* (3). The question is whether, when the purchaser, under the provisions of the contract, makes a requisition for compensation, the vendor is entitled to rescind the contract. At any rate the contract cannot be at an end until the vendor has returned the deposit. The contract is still in existence, and the question is to what extent it exists,—whether the vendor is bound only to

(1) Sect. 9 provides that "A vendor or purchaser of real or leasehold estate in *England*, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a Judge of the Court of Chancery in *England* in Chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the Judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid."

(2) 31 Ch. D. 344.

(3) 32 Ch. D. 454.

return the deposit, or whether he is bound to make compensation to the purchaser.

NORTH, J.:—

I do not think that the cases referred to have any bearing upon the present case; they do not relate to those words of sect. 9 of the Act which are now in question. In neither of those cases was any question raised as to the existence or validity of the contract. The point now raised is, whether the question of the validity of the vendor's notice to rescind the contract is a question "affecting the existence or validity of the contract," and therefore excepted from the jurisdiction by summons given by sect. 9. The matter comes on for hearing in precisely the same way as it would if an action had been brought, and the Court ought to dispose of it upon the summons if it can possibly do so. I think that according to the true construction of sect. 9, the words of exception refer to the existence or validity of the contract in its inception, and do not preclude the Court from deciding upon a summons the validity of a vendor's notice to rescind the contract. The question whether a power to rescind has been well exercised has often been decided by the Court upon a summons under this section. *In re Dames and Wood* (1) is one of such cases. Therefore, I overrule the preliminary objection. If the matter had been discussed before the Chief Clerk in Chambers, I should have thought that the objection to the jurisdiction had been taken too late. The matter, however, was not discussed at all in Chambers, but the summons was adjourned at once into Court. If I had allowed the objection I should have disallowed all the costs of the evidence on the summons.

The summons was then heard on the merits, and in the result

NORTH, J., held that the vendor was entitled to rescind the contract.

Solicitors for Purchaser: *Burton, Yeates & Co.*, agents for *S. Hart Jackson, Ulverston.*

Solicitors for Vendor: *Indermaur & Brown*, agents for *M. J. A. Dickinson, Broughton-in-Furness.*

(1) 29 Ch. D. 626. W. L. C.

NORTH, J.
1887
Oct. 28.

GARFITT *v.* ALLEN.

[1886 G. 1059.]

ALLEN *v.* LONGSTAFFE.

[1883 A. 1506.]

Legacies—Charge on Realty—Back Rents.

Where a devisee or his assigns have been in possession of real estate charged with the payment of legacies, and the estate proves insufficient to satisfy the legacies, the legatees are not entitled to back rents.

GEORGE ALLEN, the testator, died in June, 1865, having devised specific and residuary real estate to his nephew *George Allen*, a Defendant to both the above actions, subject to any mortgages which might be subsisting thereon at his death, in exoneration of all his other real estate and his personal estate, and also subject and charged as thereinafter mentioned: he bequeathed to *Elizabeth Allen*, the widow of his late brother *Charles*, a life annuity of £60, to be charged on his real estate devised to the Defendant *George Allen*. He bequeathed a legacy of £1000 to his nephew *Charles Allen*, and legacies of £500 each to his nephew *Philip Lindsay Allen* and his nieces *Elizabeth Squire*, *Caroline Allen*, *Eliza Allen*, and *Esther Allen*, and expressly charged all his said legacies upon his real estate devised to the Defendant *George Allen*. He directed the same legacies to be paid as to one moiety at the expiration of six months after his own decease, and as to the other moiety at the expiration of six months after the decease of the annuitant, *Elizabeth Allen*.

Elizabeth Allen died in November, 1882. At that time there were owing to her seven years' arrears of interest, which arrears and an apportioned part of a half-year's interest remained due to her estate down to the commencement of these proceedings.

In December, 1880, the Defendant *George Allen* filed a petition for liquidation of his affairs in bankruptcy, and in January, 1881, it was resolved by his creditors that his affairs should be liquidated by arrangement, and *John Longstaffe* was appointed trustee of his estate. *John Longstaffe* as such trustee entered into the

receipt of the rents and profits of the real estate devised by *George Allen* deceased, to his nephew *George Allen*.

At the time of the institution of *Allen* v. *Longstaffe*, the first of these actions, besides arrears of the annuity bequeathed to *Elizabeth Allen*, parts of the legacies charged on the real estate devised to *George Allen*, the Defendant, were unpaid. That action was brought by the executors of *Elizabeth Allen* and some of the legatees to enforce the charge. *Garfitt* v. *Allen* was a similar action by mortgagees of one of the legacies. The actions were consolidated; the real estate devised to the Defendant *George Allen* was sold; and the proceeds paid into Court, to be applied towards satisfying the arrears of the annuity and the unpaid legacies. They were insufficient. An order had been obtained in Chambers by the Plaintiffs in *Allen* v. *Longstaffe*:

"That the rents and profits of the real estate of the said testator received by the Defendant *John Longstaffe* from the 27th January, 1881, the date of his appointment to be trustee of the estate of the Defendant, *George Allen*, a liquidating debtor, down to the date of the sale of such real estates, after payment of the interest on the prior incumbrances thereon, and subject to all proper allowances for repairs and outgoings, be applied rateably in discharge of the annuity and legacies given by the will of the said testator so far as they remain unsatisfied. And the costs of this application are to be costs in the action."

This was a motion on the part of *John Longstaffe* to discharge that order.

Cozens-Hardy, Q.C., and *Eastwick*, for the motion:—

It is settled law that a mortgagee who has not taken possession has no right against a person subsequent to himself in charge who has been in possession to an account of back rents: *Ex parte Wilson* (1). The legatees are in no higher position against the devisee than a first mortgagee is in against a second mortgagee.

E. B. Cooper, for the Plaintiffs in *Allen* v. *Longstaffe*:—

This is not a case of contract like that of mortgagee and mortgagor. The parties are co-beneficiaries under a will. It was the

(1) 2 V. & B. 252.

NORTH, J. 1887 GARFITT v. ALLEN. ALLEN v. LONGSTAFFE.

intention of the testator that the devisee should get nothing unless the legacies were paid in full. The true analogy is to that of legatee and residuary legatee: *Birch* v. *Sherratt* (1); *Booth* v. *Coulton* (2).

NORTH, J. (after stating the facts, continued):—

The persons entitled to the annuity or legacies are in the position simply of persons having a charge on real estate; they have no legal estate. They are in the position of equitable mortgagees; they could not have taken possession of the land; they could have enforced their charge by (amongst other things) getting the appointment of a receiver if they had thought fit to do so. They did not take steps to enforce their charge, and they are, in my opinion, in exactly the same position as a mortgagee who has not entered into possession. A mortgagee who has not entered into possession is not entitled to an account from a second mortgagee who has been in possession. Under the circumstances it seems to me the order made in Chambers was not right and must be discharged. I must make the costs of this application costs in the action.

Solicitors for the Trustee in Liquidation: *Saltwell & Tryon.*
Solicitors for the Legatees: *Hatchett-Jones & Co.*

(1) Law Rep. 2 Ch. 644, 648, 649. (2) Law Rep. 5 Ch. 684, 686.

D. P.

UNION BANK *v.* MUNSTER.

KEKEWICH, J.

1887

Oct. 31.

[1886 U. 668.]

Auction—Fictitious Bidding by Stranger—Sale under Court—Other Parties—Specific Performance—Text-books.

It is no defence to an action for specific performance brought by the vendors against the purchaser at a sale by auction, that unknown to the vendors, a fictitious bidding was made, and that the purchaser was thereby induced to give more than he had previously bid, which was more than the reserved price.

Fry on Specific Performance, § 699, discussed. Observations on the citation of text-books as authorities.

On a sale by mortgagees under the direction of the Court in a foreclosure action, the mortgagees are ordinary vendors and are not liable for the acts of other parties to the action.

THE *Union Bank of London*, as equitable mortgagees of certain property at *Lancing*, brought an action for foreclosure against *J. J. C. Mayall*, the mortgagor and the other mortgagees.

By an order made in the action, the property was directed to be sold, the *Union Bank* having the conduct of the sale. The auction took place on the 11th of June, 1886. As to one of the lots a reserved price of £2250 was fixed. *H. Munster*, the Defendant, bid £2270; then one *Brown*, alleged by the Defendant to have been employed by *Mayall*, the mortgagor, and to have no intention of completing, made further biddings. The Defendant also made further biddings, and the lot was knocked down to him at £2610. He duly signed the contract and appeared to have accepted the title, but refused to complete, whereupon this action was brought by the *Union Bank* for specific performance.

The defence was that the Defendant was induced by the fraud of *Mayall* and *Brown* to bid more than £2270.

The action now came on for hearing with witnesses, but before they were called the legal question was argued whether if the facts were as alleged by the Defendant he would not nevertheless be bound to complete.

Lemon, for the *Union Bank*:—

Brown had no connection with the vendors, and even if there

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was any fraud in his biddings it was not the fraud of the vendors. No doubt there is a passage in *Fry* on Specific Performance (1) which is favourable to the Defendant, but, as the author states, there has been no decision to that effect. As to fraud by a third party: *Cobbett* v. *Brock* (2); *Weir* v. *Bell* (3).

Oswald, for the Defendant:—

This is not the case of a simple vendor for himself. Here the vendor has merely the conduct of the sale, which is for the benefit of all parties, including the mortgagor. He must therefore be considered as one of the vendors, and a fictitious bidding by any one employed by him will make it impossible to enforce the contract. It would be proved that *Brown* was in the habit of attending auctions, and that at this very auction he bid for one lot, which was knocked down to him; and he gave for the deposit a cheque, which was not honoured. The Defendant was the only genuine bidder, and has by these fictitious biddings been led on to give too much. Even if the Plaintiffs are held to have nothing to do with *Brown*, he has committed a fraud, and why is the Defendant to be the sufferer from the fraud? Nor if *Brown* had bid from mere mischief ought the Defendant to suffer.

KEKEWICH, J.:—

As I am going to decide the question of law without oral evidence as on admitted facts, it is convenient that I should state what I consider the facts to be.

The *Union Bank of London* were mortgagees of the property in question in this action and of other property. They were Plaintiffs in an action for foreclosure or sale, and in that action an order was made directing a sale by public auction or private contract, the Plaintiffs having the conduct of that sale and the right to receive the purchase-money which was to be paid by them into Court. Mr. *Oswald* says that they were not the sole vendors; in other words, as he also put it, that they were trustees for the other parties to the action, one of them being of course the owner of the equity of redemption. That they were trustees

(1) § 699, 2nd Ed. (2) 20 Beav. 524.
(3) 3 Ex. D. 238, 243.

is true; but that they were not the sole vendors I do not agree. I think that they were, in the ordinary sense of the word, the vendors, subject to all the liabilities of vendors, and also possessing all the rights of vendors.

The property was put up for sale, and it is admitted that the Defendant *Munster* bid up to £2270, which was somewhat in excess of the reserve price, a price properly reserved. It seems that after that, there were further biddings made by a person named *Brown*, and I take it to be admitted for the purposes of his argument that *Brown* was agent for *Mayall*, and that *Mayall* was the owner of the equity of redemption, with a possible, however remote, interest in the purchase-money; so that he was interested in seeing that the property was sold for the highest possible price in order that on taking the mortgage account there might be something coming to him as owner of the equity of redemption. I take it to be further admitted that *Brown* bid without the slightest intention of performing the contract if the property was knocked down to him and a formal contract with him was entered into, and that the owner of the equity of redemption and his agent were equally incapable of performing the contract. That such conduct was dishonest admits, of course, of no argument. For a man to go into an auction room and bid either a large or a small sum for a property when he knows that it is impossible for him to perform the contract is, of course, dishonest. But there is no question here of any privity of the vendors either in person or through the auctioneer or otherwise, with that dishonesty. On the contrary the biddings were accepted by the auctioneer as regular *bonâ fide* biddings, and Mr. *Oswald* has added in argument a statement which he says he can prove, and which beyond all question would shew this to be so; for he tells me that this man *Brown* actually signed a contract for another lot at the same sale, and was accepted by the auctioneer as the purchaser of that lot; and he would of course have been accepted by the auctioneer as the purchaser of this lot if the Defendant had not made an advanced bid. Those being the facts, the question is whether the Defendant can avoid his contract for purchase by reason of the dishonesty of the man *Brown* and his principal *Mayall*. I agree that it is the duty of

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vendors either personally or through their agents to see that an auction is properly and honestly conducted, but I think it is also the duty of the purchaser to see against whom he is bidding; and if vendors are to be held liable for dishonest biddings, there is at least some ground for saying that purchasers should be held equally liable.

The argument, however, has been almost entirely rested upon one passage in the work of Lord Justice *Fry* on Specific Performance. It is to my mind much to be regretted, and it is a regret which I believe every Judge on the bench shares, that text-books are more and more quoted in Court—I mean of course text-books by living authors—and some Judges have gone so far as to say that they shall not be quoted. In the preface to this very book we have a warning against it by the learned author himself. I cannot forbear from quoting the words: "There is one notion often expressed with regard to works written or revised by authors on the bench, which seems to me in part at least erroneous, the notion, I mean, that they possess a quasi-judicial authority," and then he gives a reason which must commend itself to all students why that notion is erroneous. In the passage relied upon the Lord Justice refers to the general equitable principle, and on that rests his opinion that the fraudulent act of a mere stranger to which the plaintiff was neither party nor privy, would deprive him of his right to enforce the performance of the contract. If that position were advanced by way of argument at the bar, the counsel of course would be required to say: "What do you mean by the fraudulent act of a mere stranger?" We cannot ask this question of the author, and it may be that the learned author here did not think it wise or desirable, there being no judicial answer to the question he puts, to go into the matter more fully. But in my opinion the fraudulent act of a mere stranger, such as would deprive a vendor of his right to enforce the performance of the contract honestly entered into by him, must be something more than the mere dishonesty of a person, whether a stranger or not, who makes biddings, which are real biddings in this sense—that they might and probably would, if no advance were made, lead to a complete legal contract. I think that there must be something more than that to

constitute a fraudulent act within the meaning of Lord Justice *Fry* in that passage. For instance, I can well understand the owner of an adjoining house to that which is offered for sale, thinking it desirable, although I do not think it would be right, to run up the biddings at a sale of that house, in order that if he desired to offer his own for sale he might thereby be able to get a higher price for it. It would not be right if he did not intend to complete the purchase, and it certainly would not be right if he had not the means of completing the purchase: but still an act of that kind, though dishonest, does not seem to me to be of that fraudulent character which would entitle a purchaser to avail himself of the general equitable principle that no person, though innocent, can derive a benefit from the fraud of another. I decide this case on that ground without in the slightest degree impugning, and leaving for future discussion, the view stated by Lord Justice *Fry*, or rather the answer given by him to the question which he asks. I hold that such an act of such a character as occurs here does not come within the fraud to which he refers.

Having said so much, I think it right to give Mr. *Oswald* an opportunity, if he desires it, of proving a fraud, but I think that I have clearly stated the fraud which he alleges, and which I have assumed to be proved for the purposes of the argument, and of course he will understand that if he proves the fraud he will not alter my decision. It will only enable him to take the facts before another Court in a proved form instead of an admitted form. My judgment in any case will be a judgment for specific performance with costs.

Oswald elected not to call evidence.

Solicitors for Plaintiffs: *Campbell, Reeves & Hooper.*
Solicitor for Defendant: *W. Brewer.*

C. M.

C. A.
1887
Oct. 27;
Nov. 3.

MITCHELL *v.* CANTRILL.

[1887 M. 5446.]

Light—Prescription—2 & 3 *Will.* 4, *c.* 71, *s.* 3 [*Revised Ed. Statutes, vol. vii., p.* 224]—*Reservation in Lease of Right to obstruct Lights.*

A landowner granted a lease to the Plaintiff of a house and land with their appurtenants, except rights, if any, restricting the free use of any adjoining land, or the appropriation at any time thereafter of any such land for building or other purposes, obstructive or otherwise. More than twenty years after this lease the subsequent lessee of an adjoining piece of land under the same landowner commenced to build on it in such a way as to obstruct the Plaintiff's lights. The Plaintiff having brought an action and moved for an injunction:—

Held, that the exception of any right restricting the free use of the adjoining land did not operate as an agreement or consent on the part of the lessee that the owners of the adjoining land might always have a right to obstruct the access of light to the Plaintiff's house, within the exception in the 3rd section of the *Prescription Act*, and, therefore, that the Plaintiff had acquired an absolute prescriptive right to the light and was entitled to an injunction.

THIS was an appeal from an order of the District Registrar at *Liverpool*, sitting as deputy for the Vice-Chancellor of the County Palatine of *Lancaster*.

The facts were shortly as follows:—

By an indenture, dated the 21st of April, 1864, Sir *Humphrey de Trafford* demised to *W. Dearden* a plot of land at *Stratford*, in the county of *Lancaster*, and the dwelling-house recently erected by the lessee on the same plot, with all rights and appurtenances, legal, used, or reputed, to the said plot of land, except rights, if any, restricting the free use of any adjoining land or the conversion or appropriation at any time thereafter of such land for building or other purposes, obstructive or otherwise, for 999 years, at the yearly rent of £12 14*s.* 2*d.*

By another indenture of lease, dated the 21st of October, 1865, Sir *Humphrey de Trafford* demised an adjoining plot of land with the dwelling-house recently erected there to *W. Cantrill*, and all rights and appurtenants, with an exception expressed in similar terms to that in last-mentioned lease.

The Plaintiff was the assignee of *Dearden's* lease and the present occupier of the house. Four of his windows overlooked the land demised to *Cantrill*, and he had, since the date of his lease, enjoyed the light coming to these windows over *Cantrill's* land. In July, 1887, the Defendant, *Mary Ann Cantrill*, the executrix of *W. Cantrill* and present occupier of his house, commenced to build an addition to her house, which was intended to approach 18 feet nearer to the Plaintiff's house, and would, as he alleged, interfere with the access of light and air. The Plaintiff remonstrated with the Defendant, and after some correspondence brought the present action on the 10th of September, 1887, claiming an injunction to restrain the Defendant from erecting any building in such a way as to obstruct any of the lights and windows of his house.

On the 22nd of September the Plaintiff moved for an injunction in the Palatine Court, before the District Registrar at *Liverpool*, sitting as deputy to the Vice-Chancellor, who refused the application, being of opinion that the Plaintiff was debarred from bringing the action by the terms of the lease of the 21st of April, 1864, and from this decision the Plaintiff appealed.

Affidavits were filed supporting the Plaintiff's case.

Cozens-Hardy, Q.C., and *Clarkson*, for the Appellant:—

The Plaintiff relies upon the absolute right which was gained under the 3rd section of the *Prescription Act* (2 & 3 Will. 4, c. 71), which enacts that where the access of light to any dwelling-house shall have been enjoyed without interruption for twenty years the right thereto shall be deemed absolute and indefeasible, "unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." In the present case there was no such consent or agreement. The clause on which the Defendant relies was not an agreement that the owners of adjoining land should always have a right to interrupt the access of light to the demised premises, but was only meant to negative the implied right which the lessee would have otherwise had of insisting that the lessor should not derogate from his own grant by building on the adjoining land. Consequently the lessor might have built on

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the adjoining land if he pleased at any time within twenty years, but as he did not do so, the lessee acquired an absolute right under the *Prescription Act* against all the world. The circumstance that the Plaintiff and Defendant both hold under the same lessor does not prevent the Plaintiff from acquiring a right against the Defendant which he can enforce by injunction; *Frewen* v. *Philipps* (1).

Horton Smith, Q.C., and *Bather*, for the Defendant:—

During the whole of the twenty years the right to light was enjoyed by the Plaintiff under the terms of the agreement contained in his lease; therefore, there was an agreement or consent within the exception in the 3rd section of the *Prescription Act*. It was part of the bargain between the Plaintiff and his lessor that the Plaintiff should have only a restricted right to light. The Plaintiff was in fact a tenant by sufferance of the right to light, and his payment of rent was a continued acknowledgment of his tenancy. That tenancy could be terminated by the lessor or his assigns at any moment: *Bewley* v. *Atkinson* (2). Being a lessee under the same lessor as the Plaintiff, the Defendant has a right to the benefit of the stipulations in the Plaintiff's lease: *Taite* v. *Gosling* (3).

Cozens-Hardy, in reply.

COTTON, L.J.:—

This was an appeal from an order of the Registrar of the Palatine Court, who, without entering into the facts of the case, dismissed the motion on the ground that the lease under which the Plaintiff in the case claimed to be and was entitled to his house, prevented him from bringing any action like this against a lessee on the same estate for obstructing his lights. He has been in occupation of this property since 1864, and we must assume that during that period he has enjoyed the lights of that house without any interference by the Defendant in the action, who now is going to build or has built, since the action was commenced, so as

(1) 11 C. B. (N.S.) 449. (2) 13 Ch. D. 283.
(3) 11 Ch. D. 273.

he alleges, to obstruct and interfere with his lights. That point has not been entered into because the learned Registrar dismissed the motion simply on the ground that under his lease there was a proviso which prevented him from getting any right to lights or bringing any action in respect of interference with his lights. We must consider therefore, if that is so. In my opinion, that was an incorrect view. It all turned on one particular provision in the lease, which was a lease for 999 years, and which was granted in pursuance of a building agreement, whether to him or some one else is immaterial. But the house had been built under the agreement at the time the lease was granted, and therefore the lease was of the plot of land, "And all that dwelling-house recently erected by the said lessee on the said plot." Now comes the passage relied upon by the Registrar: "and all rights and appurtenances legal, used or reputed, to the said plot." There is probably some inaccuracy either in copying or in the words of the deed; but it really means all appurtenances legal, used or reputed of the said plot, "Except rights, if any, restricting the free use of any adjoining land, or the conversion or appropriation at any time hereafter of such land for building or other purposes, obstructive or otherwise." Well, it is clear that this was part of an estate which was being used for building purposes, and subsequent to that time a similar lease was granted to *W. Cantrill*, whom the Defendant represents. But has this clause the effect which is attributed to it by the learned Registrar of preventing the Plaintiff in the action from claiming any right under the statute? because it is under that he claims his right to light. It is said that it brings the case within the proviso at the end of the 3rd section of the *Prescription Act*, and therefore prevents him from relying upon that section. Does it do so? The enactment is this, that the right to light is granted where there has been an enjoyment of the access and use of light for twenty years, "unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." Now does this clause which I have read bring it within that? In my opinion it does not. It is not an agreement given for the purpose of the enjoyment of the light, but it is simply an exception out of the grant made of

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appurtenances and rights, so as to prevent the lessee from urging as against the landlord or anybody claiming through him, before a right had been obtained under the statute, that the landlord could not derogate from his own grant either by his building or granting to anybody else a right to build so as to interfere with the Plaintiff's lights. That is the reasonable, and I think, the only meaning of this clause. It was in effect saying, "If I grant this house to you without protecting myself, you will say, if I build up any adjoining house, that is derogating from my own grant; and this clause is to prevent any such contention being made." But if independently of the grant the lessee has enjoyed the use of these windows for twenty years he will have the same right as against the adjoining lessee as against a stranger. There was certainly no case referred to in the argument to shew that such claim as is contended for by the Plaintiff exists. But he has the right simply by the effect and operation, not of the grant, but of the statute, and in my opinion he is entitled to enforce that.

Then there was another point which was suggested, that this must be considered an agreement between the landlord and the lessee, that the landlord should be at liberty if he thought fit to do anything, even although it would operate so as to interfere with his right to light; but I do not think that is the true meaning of it. If you had an express proviso in the contract between the parties that, notwithstanding the grant to the Plaintiff, the landlord should be at liberty to build so as to interfere with his right, that would be another point, but that is not the express form of it, and in my opinion the fair and clear meaning of this clause, construing it without reference to the consequences to one party or the other, is not anything of that sort. During the twenty years before he acquired the right under the statute it is true that the lessor would have been able to build, not because there was a contract between the owner and the lessee that he could do anything he liked although it obstructed the lessee's lights, but because under the statute during the twenty years the lessee would not have got any right; and this clause in the statute prevents his acquiring a right as against the landlord and those claiming under him. In my opinion neither view can assist the Defendant in this case.

The case must go on to be tried on the evidence. As the house has been built, I think the proper course will be, not to send this motion to be heard before the Vice-Chancellor, because it would not be right under the circumstances to grant before the hearing a mandatory injunction, but to discharge the order and direct the motion to come on with the trial of the action. If the Plaintiff establishes his case, of course there will be a mandatory injunction, as through no fault of his, but in consequence of the error in law into which the Registrar has fallen, he was not able to stop the Defendant from erecting this building.

The only other matter I need mention is the case of *Bewley* v. *Atkinson* (1). There was in that case an express agreement as to the use and enjoyment of light, and the only question there was whether a writing signed, not by the owner of the servient tenement, but simply by the owner of the dominant tenement, would be a good agreement within the proviso in the statute; that was the point for the consideration of the Court, and the Lords Justices held it was. That has no application to a case like this, where there is no such express agreement as to enjoyment of light. In my opinion therefore the appeal succeeds, and the order which I have mentioned should be made.

LINDLEY, L.J.:—

I am of the same opinion. As I understand the matter the learned Registrar decided against the Plaintiff upon the footing that the Plantiff's lease was conclusive against him. Now, has the Plaintiff by the lease the right to restrain the Defendant from building on the adjoining plot? The learned Registrar has decided he has not, because the lease contains a clause which is inconsistent with such a right. But that does not dispose of the case at all; the question is whether the Plaintiff has not by actual enjoyment of the access of light for twenty years acquired something in addition to what the lease gives him. When you look at the 3rd section of the Act it appears to me his case upon that Act is unanswerable. That the Plaintiff can acquire an easement to light under circumstances such as these when both the Plaintiff and the Defendant are under the same landlord, is

(1) 13 Ch. D. 283.

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settled by the case of *Frewen* v. *Philipps* (1). Here the Plaintiff has in fact enjoyed the access of light for twenty years; that has not been controverted; that is a fact, and that gives him a statutory right to light unless the last part of sect. 3 applies to this case. Now the last part of sect. 3 is this—after saying that access of light for twenty years shall confer a right—the section says, "unless it shall appear that the same was enjoyed," that is, the access of light was enjoyed "by some consent or agreement expressly made or given for that purpose by deed or writing." Now, I cannot construe this document as an express deed or writing under which the right of light was enjoyed without going the length of holding that every grant or lease under which the grantee or lessee enjoys a right of light, not because it is given or referred to, but by reason of the ownership given by the grant or lease, is within this clause. But such a construction would destroy the section altogether. The last words in the section mean that when you find an agreement under which the light is enjoyed you must look at that agreement and see what, if any, right to light is expressly given by it. Here the Plaintiff falls under the words of the statute, and it appears to me the contention of the Defendant is not warranted by the words at the end of the section. There is nothing except the grant coupled with the words which Lord Justice *Cotton* has alluded to, and which obviously are for the purpose of preserving to the lessor a right, until an adverse right is acquired, of doing what he likes with the adjoining property. Under the grant he could deal with that property as he liked within the twenty years, and within that period he might have blocked up all these lights; but after the Plaintiff has enjoyed them without interruption for twenty years the statute confers upon him a right to their future enjoyment. I think therefore this appeal should be allowed.

LOPES, L.J.:—

The question in this case is, what is the meaning of this reservation? Is it a bargain between a lessor and a lessee that the lessor is always to have a right to use the adjoining land as he thinks fit, or is it a reservation in a more limited sense? It is

(1) 11 C. B. (N.S.) 449.

clear what the position would have been if this reservation had not been inserted. The lessor, after he granted the lease, could not have used the adjoining land in a way to prejudice any rights arising from the lease he had granted. If he had so done it would have been an act in derogation of his grant. I think therefore that the reservation means that such consequences are not to follow as would necessarily follow if the reservation had not been there, namely, that the lessee is not to be permitted to say to the lessor, "You are acting in derogation of your grant." The reservation according to my view cannot be used in any way so as to prevent the acquisition of a right *aliunde*, for instance by the operation of the *Prescription Act*. It is said however that the case comes within the latter part of the 3rd section of the *Prescription Act*, which words are: "unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing." For the reasons which have already been given I am clearly of opinion it cannot be brought within those words. I think therefore the view the learned Registrar took was wrong, and that this appeal should be allowed.

Solicitors for Plaintiff: *Byrne & Lucas*, agents for *Taylor, Kirkman, & Colley, Manchester.*

Solicitors for Defendant: *Rowcliffes, Rawle, & Co.*, agents for *Cooper & Sons, Manchester.*

M. W.

C. A. 1887 Nov. 3.

SOUTHPORT AND WEST LANCASHIRE BANKING COMPANY *v.* THOMPSON.

[1887 S. 2.]

Fixtures—Mortgagor and Mortgagee—Mortgage by Demise—Trade Fixtures.

Words which in a conveyance in fee by way of mortgage are sufficient to pass trade fixtures will have the same effect when the mortgage is of leasehold property by sub-demise; but in the latter case the absolute property in such fixtures as separate chattels with the right to remove and sell will not pass to the mortgagee unless an intention to that effect is apparent on the deed.

Hawtry v. *Butlin* (1) explained.

APPEAL from Vice-Chancellor of County Palatine of *Lancaster*.

The action was brought by the Plaintiff company as mortgagees under an indenture of mortgage by demise of the 26th of January, 1882, against the liquidator of the *Appley Bridge Corn Mill Company* (the mortgagors), for a foreclosure or sale, and also for an injunction to restrain the Defendant from selling or removing any machinery, articles, or things affixed or fastened to the freehold of the mortgaged property.

The question between the parties was whether under the mortgage engine-boilers and shafting (the motive power) alone passed to the mortgagees, or whether in addition to the motive power the trade machinery also passed.

Vice-Chancellor *Bristowe* having decided that the motive power alone passed to the Plaintiffs under their mortgage, they now appealed from this decision.

The *Appley Bridge and West Lancashire Corn Mill Company, Limited*, was formed in 1876, and carried on business as corn millers and flour dealers at *Appley Bridge*.

In 1881 the account of the corn mill company with the Plaintiff bank being overdrawn it was arranged that the bank should take a second charge on the mill to secure a sum not exceeding £5000—a prior charge for £10,000 on security of the mill premises having been executed to the *Burnley Building Society* by

(1) Law Rep. 8 Q. B. 290.

the company in February, 1881. A mortgage dated the 26th of January, 1882, was accordingly executed, by which, subject to the mortgage to the building society, the corn mill company, as beneficial owners, demised to the bank by way of mortgage for the residue, less one day, of the several terms for which they were respectively held, three separate leasehold properties :—

1. Property at *Wrightington* (the site of the corn mill) comprised in a lease to the company for a term of 999 years from the 2nd of February, 1876, "and also all and every the corn mill and the warehouse and other buildings adjoining thereto, or used in connection therewith, recently erected by the corn mill company upon the said plot of land or on some part thereof, and also all and every the steam-engines, steam-boilers, main and cross shafting and gearing, steam, gas and other pipes, pillars, and all other the fixtures and fixed machinery therein which either by itself or in conjunction with other machinery, supplies or assists to supply the motive power to the said corn mill and works."

2. All that plot of land in *Wrightington*, and two semi-detached villa residences erected and now being upon the said plot of land.

3. A plot of land containing 1126 square yards situate at or near to *Appley Bridge* demised to the corn mill company by lease of the 15th of July, 1878, for the term of 999 years, and all and every the erections and buildings now erected, or which may at any time during the continuance of this security be erected upon the said plot of land or on any part thereof, "Together with all buildings, fixtures, rights, lights, easements, advantages, hereditaments, and appurtenances whatsoever to the said premises hereinbefore firstly, secondly, and thirdly described respectively belonging or appertaining (except as is respectively reserved in and by the hereinbefore mentioned indenture of lease respectively)."

The deed contained a power of sale but no special power of severance, and there was no assignment of the trade machinery.

The mortgage was not registered under the *Bills of Sale Act*, 1878.

In January, 1885, the corn mill company went into voluntary liquidation, and the Defendant *Thompson* was appointed liquidator.

C. A. 1887 — SOUTHPORT AND WEST LANCASHIRE BANKING COMPANY v. THOMPSON.

In January, 1887, *Thompson* advertised for sale by public auction certain machinery and effects in and about the mill and premises, comprising machines and articles coming under the description of trade fixtures.

The banking company thereupon brought this action in the *Lancaster* Palatine Court for foreclosure or sale, and for an injunction to restrain the sale of any of the trade fixtures.

The case was heard at *Liverpool* in March last before Vice-Chancellor *Bristowe*, who held that the word "fixtures" used in the general words meant fixtures *ejusdem generis* with those first enumerated, and not a fresh set of fixtures comprised within the corn mill and called trade machinery. In the course of his judgment the Vice-Chancellor said that it was important to observe that both in *Mather* v. *Fraser* (1) and *Haley* v. *Hammersley* (2) the mortgage was not a mortgage by demise, but a mortgage in fee. Referring upon this point to the judgment of Mr. Justice *Blackburn* in *Hawtry* v. *Butlin* (3): "But when a person has a limited interest in land such as a term of years, and on the land there are fixtures in which he has an absolute property, and he mortgages his interest in the land by way of underlease, I should think that the property in the fixtures would not pass by the mortgage, and the right to sever them would still remain in the mortgagor, unless there is a clear intention, to be gathered from the terms of the mortgage deed, to convey the absolute interest in the fixtures as well as the limited interest in the land"—the distinction there taken was in his view the true basis upon which to decide this case. Having regard to *Mather* v. *Fraser* and *Haley* v. *Hammersley*, if this were a mortgage in fee, the word "fixtures" in the latter portion of the deed would unquestionably carry these trade fixtures. But being a mortgage by demise the question was whether the distinction taken by Mr. Justice *Blackburn* did not apply, and whether it was not the true construction that although the word "fixtures" might be used in the latter part of the deed, it meant fixtures *ejusdem generis* with those already described. In his judgment that was the true construction to adopt.

(1) 2 K. & J. 536. (2) 3 D. F. & J. 587.
(3) Law Rep. 8 Q. B. 290, 293.

The Vice-Chancellor accordingly held that the power machinery all passed under the deed, but that the trade machinery did not pass.

From this decision the Plaintiffs appealed.

R. Neville (*P. O. Lawrence*, with him), in support of the appeal:—

The Defendant was not entitled to sever and sell the trade fixtures, which passed by the mortgage to the Plaintiffs as an essential part of their security. The observations of Mr. Justice *Blackburn* in *Hawtry* v. *Butlin* (1) appear to have been relied upon by the Vice-Chancellor as shewing that there is a distinction between a mortgage in fee and a mortgage by underlease, and that in the latter case the property in the fixtures will not pass by the mortgage. We submit that no such distinction can be maintained. The right of a mortgagee by underlease to the enjoyment of the property (including the trade fixtures) during the term, in the state in which it was demised to him, is absolute: *In re Joyce* (2); nor is it affected by the subsequent bankruptcy of the mortgagor so as to pass the fixtures to his assignees in bankruptcy: *In re Gawan* (3). Then upon the construction of the mortgage deed, it is submitted that the enumeration of certain articles constituting the motive power of the mill cannot have the effect of restricting the subsequent general words to fixtures *ejusdem generis* with those previously mentioned, but that everything connected with and necessary for the working of the mill, and included in the term trade machinery, passed to the mortgagees: *Mather* v. *Fraser* (4); *Haley* v. *Hammersley* (5).

[LINDLEY, L.J., referred to *Holland* v. *Hodgson* (6).]

Rigby, Q.C., and *Maberly*, for the Respondent:—

We do not rest our case upon the observations of Mr. Justice *Blackburn* in *Hawtry* v. *Butlin*, but we submit that inasmuch as the *Bills of Sale Act*, 1878, draws a marked distinction between fixed trade machinery and other fixtures, such as the fixed motive

(1) Law Rep. 8 Q. B. 293.
(2) Ibid. 9 Ch. 576, 580.
(3) 5 D. M. & G. 403.
(4) 2 K. & J. 536, 553.
(5) 3 D. F. & J. 587.
(6) Law Rep. 7 C. P. 328.

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power, shafts, wheels and drums, and steam, gas, and water pipes —it being enacted (sect. 5) that the former class shall, for the purposes of the Act, but that the latter shall not be deemed to be personal chattels—the trade machinery did not pass by the mortgage. The enumeration of the fixtures after the property first conveyed is not arbitrary, but comprises precisely those particular articles which the Act of 1878 separates, and declares not to be personal chattels for the purposes of the Act, and this enumeration shews conclusively that nothing was intended to pass except fixtures *ejusdem generis* with the articles expressly mentioned. *Mather* v. *Fraser* (1) and *Haley* v. *Hammersley* (2) may be distinguished, as in both cases the words of grant were much more extensive: in the one all and singular the "machinery" being included in the specific enumeration; in the other "and other machinery and fixtures whatsoever." In construing the general words (in this case "all fixtures") nothing is better settled than that the general words, even where sufficient *ex vi terminorum* to sweep in anything accidentally omitted, are restricted by the scope of the instrument, and that things to be swept in must *primâ facie* be of the same class and nature as those which have been specifically enumerated: *Crompton* v. *Jarratt* (3); *Howard* v. *Earl of Shrewsbury* (4).

COTTON, L.J.:—

To a considerable extent I think the Vice-Chancellor relied upon what was said by Mr. Justice *Blackburn* in *Hawtry* v. *Butlin* (5). Mr. *Rigby*, in his argument, did not rely upon that case really, but still as the Vice-Chancellor appears to have relied upon it to some extent, I ought, I think, to state what my opinion about it is.

It was said that there was a difference between a conveyance in fee as regards trade fixtures, and a conveyance by sub-demise where the mortgagor had himself only a term. Did Mr. Justice *Blackburn* intend to lay down any such distinction? I cannot see myself how it can be supposed that he did, because if words

(1) 2 K. & J. 536.
(2) 3 D. F. & J. 587.
(3) 30 Ch. D. 298, 316.
(4) Law Rep. 17 Eq. 378, 391.
(5) Law Rep. 8 Q. B. 290.

which are in a conveyance in fee are sufficient to pass trade fixtures, I do not see why they should not be sufficient to pass them in a conveyance by demise. What are trade fixtures? Fixtures passing with the freehold interest, if that is conveyed, or passing with the leasehold interest if the interest conveyed be leasehold. But there is this difference, that as between the landlord and tenant they are removable at the expiration of the term. That being so, as between landlord and tenant, they are in a different position to that of fixtures which are not so removable. But as regards the parcels of a conveyance, whether that conveyance be of the fee simple or of a term, they pass either by demise of the land for a term, or by grant of the fee simple. There is certainly, I think, in one respect a little ambiguity in the language of Mr. Justice *Blackburn* in his judgment. If the mortgagee is seeking to remove them and sell them he must have express power given him by the mortgagor to do so; otherwise he can only take them with the land without any right of removing them. That right of removal and sale will remain in the mortgagor, the tenant, unless he expressly parts with it, and gives power to the mortgagee who takes by demise from him. After stating that it is a mortgage in fee Mr. Justice *Blackburn* proceeds (1): "But when a person has a limited interest in land such as a term of years, and on the land there are fixtures in which he has an absolute property, and he mortgages his interest in the land by way of underlease, I should think that the property in the fixtures would not pass by the mortgage, and the right to sever them would still remain in the mortgagor"—It does not mean that they will not pass by the underlease, but that the absolute property in them will not pass so as to enable the person entitled by demise to say that he can do whatever the mortgagor could do with them, viz., remove and sell them as separate chattels. That is plain from what comes afterwards, because he goes on to say: "unless there is a clear intention, to be gathered from the terms of the mortgage deed, to convey the absolute interest in the fixtures as well as the limited interest in the land." He does not mean there that the mortgagor could remove them, while the mortgage was still unsatisfied, during the term granted

(1) Law Rep. 8 Q. B. 293.

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by way of underlease, but only that the right to remove them will remain in the mortgagor, and that it will only pass during the term demised, so as not to prevent the mortgagor from dealing with them as his absolute property after the mortgage term is satisfied. I mention that, because when one first looks at them those observations of Mr. Justice *Blackburn* do seem difficult to understand. But, as I have said, reliance was not really placed on that on behalf of the Respondent. What I understand to be the contention of the Respondent is this: there being two classes of trade fixtures; one of which the *Bills of Sale Act*, 1878, says are to be chattels personal, the others not, this deed enumerates certain fixtures, but does not enumerate any of those which the *Bills of Sale Act* says are to be personal chattels—personal chattels only for the purposes of that Act. And then it is said, although a mere demise of this mill would have granted all these fixtures, both those which are enumerated and those which are not enumerated, yet as there is an enumeration of one particular class there is an intention expressed on the face of the deed to exclude chattels not of the particular class enumerated. That, in my opinion, is merely based upon the fallacy that you must shew an intention to pass the chattels where there is a demise of the land which will carry and pass the chattels. Just see what an absurdity would be involved in acceding to the Respondent's argument that there is an intention expressed on the face of the deed to exclude these chattels. This is a mortgage of a flour mill. There are trade fixtures worth, we are told, something like £4000, and though the mill would not be entirely reduced to bare walls without them, that is to say by their removal, yet it would not be workable without them; and are we to suppose that this mortgage to a bank to secure their account is intended to exclude from the security to the bank that which alone, practically, made the property valuable? If there were express words of course we should have to deal with them, but there are no express words at all, and all that is relied upon is the implication arising from the fact that certain chattels are enumerated and others are not. In my opinion the words here are sufficient to carry by the demise of the land and the mill these trade fixtures, and there is not sufficient expression of

intention to exclude those fixtures which are not enumerated. In my opinion, therefore, the decision of the Vice-Chancellor was erroneous and must be reversed.

It is unnecessary to go through *Mather* v. *Fraser* (1) and the other cases which have been cited, where an enumeration of certain things has not been held sufficient to exclude others. A deed must be construed by itself, and one really cannot get much light by looking at the terms of another deed which has been construed in another way by the Court, when we have once got the principle for our decision that this demise is sufficient to carry trade fixtures. In my opinion there is not enough in this deed to exclude them, and the appeal must be allowed.

LINDLEY, L.J.:—

So far as I can gather the Vice-Chancellor has been a little misled by the reasons given, according to the report, by Mr. Justice *Blackburn* in his judgment in *Hawtry* v. *Butlin* (2). Undoubtedly there are expressions which at first sight appear to warrant the notion that Mr. Justice *Blackburn* was of opinion that where a mortgagor was demising land of which he was tenant for a term of years, and fixtures of which he was absolute owner, a mortgage in ordinary form would not pass the fixtures. But I do not think Lord *Blackburn* really meant that. What he meant to say, as I understand it, was that *primâ facie* such a mortgagor must not be taken to grant the fixtures as chattels separately assigned, or to do more than include them with the land in the sub-demise. And this view of his meaning is fortified by his language in *Holland* v. *Hodgson* (3), where Lord *Blackburn* again adverts to the same point. The Vice-Chancellor in arriving at the conclusion which he did arrive at here, was, I think, a little misled by those observations.

Now if we look at the matter apart from that difficulty, or with that obscurity cleared away, it appears to me, that unless it can be shewn that any fixtures were intended to be excluded, there is ample in this deed to pass the whole of them. In the first place, when the mortgagor demises the first part of the property he

(1) 2 K. & J. 536. (2) Law Rep. 8 Q. B. 293.
(3) Law Rep. 7 C. P. 328.

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says in effect, "I mean this part to include the motor machinery," and later on, when he has done with all this motive power, he says he means to pass all the fixtures and include the trade fixtures, and when he states in that way that he means both classes we are asked to say he intended to exclude one of those classes. I cannot see anything at all to justify it. We are asked to exclude some of the fixtures because the mortgagor has taken the trouble to enumerate only a portion of those things. What was the nature of this security? It was a security for money, and can it be conceived that the parties intended to exclude that which was an essential part of the security, and which if excluded would render the security worthless for the very purpose for which the parties intended it? If that intention were plainly expressed, well and good. But without any such expression of intention we cannot approach this deed with the feeling that from the nature of the security the intention was to exclude the fixtures. The parties have taken the trouble to say twice over what they meant, and I cannot come to the conclusion that they intended to exclude these fixtures.

I think the conclusion arrived at by the Vice-Chancellor in the Court below was erroneous, and that the decision therefore should be reversed.

LOPES, L.J.:—

In a mortgage of freehold property all things which are annexed to the place are part of the mortgage security, and therefore the deed need contain no mention of the fixtures. That is so unless a contrary intention can be collected from the deed. That, no doubt, is the law with regard to freehold property. But it has been said that a different rule applies when the mortgaged property is not freehold but leasehold. In my opinion there is no such distinction. The learned Vice-Chancellor seems to have relied upon certain expressions of Mr. Justice *Blackburn* in the case referred to, and I cannot help thinking that he has misapprehended the meaning of that learned Judge. According to my view what Lord *Blackburn* meant was that in the case of a mortgage of leasehold property the mortgagee was only entitled to use the fixtures for a time, and that the right to sever the

fixtures remained in the mortgagor at the end of the term. I think that is the proper construction to be placed on the expressions used by that learned Judge in the case referred to.

But it is said that these trade fixtures do not pass, because a contrary intention is to be collected from this deed. It is said that a contrary intention is to be found in the deed, and that the ordinary inference that the trade fixtures pass is rebutted because there is an enumeration of one particular class which is to be regarded as an exclusion of the other class. It is to be remembered that in this deed there appear among the general words the words "all fixtures." With regard to those words it is said they are not in any way to enlarge the specific description of the articles enumerated beforehand, but that they are to be interpreted as merely including things *ejusdem generis* with those. I cannot accept that view. I think the words "all fixtures" were put in intentionally, and were intended to extend and enlarge that which has been previously specifically described. It seems to me most unreasonable to say that an intention is to be collected from this deed not to pass these trade fixtures when it is remembered that this is a mortgage of a mill, and that if these particular articles, trade fixtures, were excluded, it would be rendering that which was intended as a mortgage security absolutely unworkable as a mill. I think, for these reasons, that the decision of the learned Vice-Chancellor is wrong, and that the appeal ought to be allowed.

Appeal allowed, with declaration that all trade fixtures and fixed machinery in and upon the Defendant's corn mill were comprised in the mortgage of the 26th of January, 1882, though not enumerated in the first part of the deed.

Solicitors: *Pritchard, Englefield, & Co.*, agents for *A. S. Mather, Liverpool; Kime & Hammond*, agents for *Buck, Dicksons, & Cockshott, Southport.*

F. G. A. W.

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1887
Nov. 7, 8.

HALL *v.* EWIN.

[1886 H. 1092.]

Lease—Restrictive Covenants—Covenant not to permit or suffer Noisome Business—Underlease—Equitable Remedy.

The Plaintiff demised a house for a term of years to *T.*, with a covenant that the lessee, his executors, administrators, and assigns, would not use the premises, or permit or suffer them to be used by any person for any noisome or offensive business. *T.* granted an underlease of the house, and the underlease was assigned to the Defendant *E.* *E.* underlet the house to *M.*, who opened a wild beast exhibition in it. The Plaintiff brought an action against *E.* and his undertenant, asking for an injunction to restrain the use of the house in that manner. There was no evidence that *E.* had consented to the use of the house, and it appeared that after complaints had been made he had requested *M.* to discontinue the exhibition :—

Held, that as against *E.* the action could not be maintained, he not being liable either at law or in equity for not taking active proceedings against his undertenant to prevent him from opening the exhibition.

Haywood v. *Brunswick Permanent Benefit Building Society* (1) followed.

THE Plaintiff, *W. H. Hall*, was the owner of a house in *Edgware Road*, in the parish of *Paddington*. By an indenture dated the 3rd of November, 1849, the Plaintiff granted a lease of the house to *G. Tarlington* for eighty years. The lease contained a covenant by the lessee for himself, his heirs, executors, administrators, and assigns, in the following terms: "That he, his executors, administrators, and assigns, shall not at any time during the said term use, exercise, or carry on in or upon the said hereby demised premises, or permit or suffer any part thereof to be occupied by any person or persons who shall use, occupy, or carry on therein any noisome or offensive trade, business, or employment whatsoever without the like consent in writing of the said *W. H. Hall*, his heirs or assigns, first obtained."

By an indenture dated the 11th of January, 1851, *G. Tarlington* demised the premises to *R. S. Ruddach* for the residue of the term of eighty years, except the last three days thereof, by way of mortgage for securing the repayment of a principal sum and interest.

(1) 8 Q. B. D. 403.

By an indenture dated the 19th of September, 1865, the executors of *R. S. Ruddach*, under the power of sale contained in the mortgage deed, assigned the premises for the residue of the term of eighty years, except the last three days thereof, to the Defendant *John Ewin*.

By an indenture dated the 29th of October, 1885, the Defendant *John Ewin* demised the premises to the Defendant *George McNeff* for twenty-one years. This lease contained the following covenant by *McNeff*: "And also shall not at any time during the said term use, exercise, or carry on in or upon the said demised premises any noisome or offensive trade, business, or employment whatsoever without the like consent in writing of the said *John Ewin*, his executors, administrators, or assigns, first obtained."

In the month of February, 1886, the Defendant *McNeff* purchased some lions, and opened an exhibition of wild beasts on the premises. He exhibited pictures outside the house, and employed black men to parade in front of it with a gong and trumpet, so that the neighbours complained of the nuisance.

The present action was brought by *W. H. Hall* and *C. Breitbart*, who was a carver and gilder, keeping a shop two doors from the premises in question, asking for an injunction to restrain *Ewin* and *McNeff* from using the premises as an exhibition of wild animals, or otherwise so as to cause a nuisance to the Plaintiffs, and also from carrying on upon the premises, or permitting or suffering any part thereof to be occupied by any person carrying on, any noisome or offensive trade or business without the consent in writing of the Plaintiff *W. H. Hall*.

In his defence the Defendant *Ewin* pleaded that if the allegations in the statement of claim were correct they created no cause of action against him, that none of the acts complained of had been committed by him, and that he had given no consent in writing to the acts complained of; but, on the contrary, he had done all in his power, save by bringing an action, to induce *McNeff* to desist from any acts which might cause annoyance to the neighbourhood, and that he was not liable for the alleged acts of *McNeff*.

The existence of the nuisance was sufficiently proved by the evidence. There was no evidence of *Ewin* having in any way

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encouraged or consented to the exhibition complained of. Three letters were put in evidence from the Plaintiffs' solicitors to *Ewin*, dated the 9th and 15th of February, and the 13th of March, 1886, complaining of the nuisance, to which *Ewin* made no reply. It also appeared that on the 12th of March the clerk of the Plaintiffs' solicitors called on *Ewin*. The latter was ill and did not see him, but sent a message down to him that he would speak to *McNeff* at once upon the subject. On the 15th of March *McNeff* wrote to the solicitors stating that he had closed the exhibition out of respect to the wishes of his landlord. It was not, however, really closed for two or three days afterwards.

On the 18th of March the Plaintiffs issued the writ in the action, asking for an injunction and damages; and on the following day gave notice of motion for an interim injunction, which was granted.

The case was heard on the 3rd of May, 1887, before Mr. Justice *Kekewich*. His Lordship was of opinion that although *Ewin* was not an assignee of the lease, he was equitably bound by the covenant, and that as he had the power to enforce his own covenants against *McNeff* and to stop the nuisance, he had broken the covenant against suffering the premises to be used for the purpose of carrying on a noisome occupation. He therefore granted the injunction against both of the Defendants, with costs. From this judgment the Defendant *Ewin* appealed.

Romer, Q.C., and *Farwell*, for the Appellant:—

As regards this Defendant, the action is misconceived, for *Ewin* is under no liability for this breach of the restrictive covenant. He was the assignee of a sub-lease, and was no longer in possession, having sub-let to *McNeff* by an instrument which contained a restrictive covenant identical with that subject to which he himself took; and the breach was committed by *McNeff* upon his own motion, and without *Ewin's* license or sanction. The learned Judge of the Court below has held *Ewin* liable apparently upon the footing that under a covenant not to "permit or suffer" the assign of the covenantor is bound to lay out money or take some active step to prevent the prohibited act, and that it is not enough for him even while out of possession to refrain from himself doing

or conducing to anything in breach of the restriction. But this is contrary to a long line of authorities: *Cox* v. *Bishop* (1); *Haywood* v. *Brunswick Permanent Benefit Building Society* (2); *London and South Western Railway Company* v. *Gomm* (3); *Austerberry* v. *Corporation of Oldham* (4); *Attorney-General* v. *Guardians of Poor of Union of Dorking* (5); *Parker* v. *Whyte* (6); *Clements* v. *Welles* (7); *Carter* v. *Williams* (8). There is no proof that *Ewin* consented to the exhibition of wild beasts; on the contrary, it is proved by the evidence that he remonstrated with his tenant when the nuisance was complained of. He did all that he could do short of taking legal proceedings, which the Court will never compel any one to do.

Warmington, Q.C., and *Sturges*, for the Plaintiffs:—

The covenants in the original lease to *Tarlington* were binding upon *Ewin*, not indeed at law, because he was not an assignee of the whole term, but certainly in equity: *Tulk* v. *Moxhay* (9). The covenants ran with the land in equity, and affected the user of the land in the hands of any one who had notice of the lease: *Cox* v. *Bishop*; *Baily* v. *De Crespigny* (10); *Cooke* v. *Chilcott* (11). If *Ewin* had been bound at law by the covenant not to permit the house to be used for an obnoxious business it would have been held that he was bound to prevent its being so used; why should not the same construction be put upon it in equity? The cases cited by the Appellant only shew that a purchaser who is only equitably bound by covenants is not bound to lay out money in keeping them. But we say that in the present case *Ewin* consented to, if he did not actually encourage, the exhibition of wild beasts, and he has not shewn, as he was bound to shew, that he did what he could to prevent the house from being so used. He returned no answer to the three letters of remonstrance which were sent to him by the Plaintiffs' solicitors, and that alone ought to make him liable for the costs of the action.

(1) 8 D. M. & G. 815.
(2) 8 Q. B. D. 403.
(3) 20 Ch. D. 562, 583.
(4) 29 Ch. D. 750.
(5) 20 Ch. D. 595, 605.
(6) 1 H. & M. 167.
(7) Law Rep. 1 Eq. 200.
(8) Ibid. 9 Eq. 678.
(9) 2 Ph. 774.
(10) Law Rep. 4 Q. B. 180.
(11) 3 Ch. D. 694.

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Farwell, in reply, as to costs:—

Ewin was ill at the time when the letters were sent: and it is proved by *McNeff's* letter that he interfered to stop the exhibition.

COTTON, L.J.:—

This is an appeal by the Defendant *Ewin* against a judgment of Mr. Justice *Kekewich*, granting an injunction restraining him from the breach of a certain covenant in a lease. Is this right? *Ewin* is in this position. The Plaintiff *Hall* granted a lease containing the covenant in question, and the lessee made a mortgage of the lease by underlease, and the mortgagee sold his interest under his power of sale to *Ewin*; therefore *Ewin* was merely an underlessee and was not bound at law by the covenants in the original lease. He would have been bound if he had taken an assignment of the estate of the lessee under the lease, but he took no such assignment. It is useless to consider whether if *Ewin* had been bound at law the Plaintiff could have maintained an action against him and got damages. If the Plaintiff is entitled to relief in this case it must be not on the ground of breach of covenant, but on the ground that he is equitably bound, on the principle laid down in *Tulk* v. *Moxhay* (1), to use the house in conformity with the covenants in the lease. I am of opinion that it would be an extension of the principle of *Tulk* v. *Moxhay* to hold him liable to an injunction in such a case as this. The words of the covenant in the original lease are these. [His Lordship read the covenant.] Then what are the facts? The Defendant *Ewin*, who was himself an underlessee, granted an underlease to *McNeff*, in which there was a covenant that he could not exercise any noisome or offensive trade or business without the consent in writing of *Ewin*. If the Plaintiffs had shewn that *Ewin* had granted this underlease for the purpose of its being used for an offensive trade or had granted a written license to *McNeff* so to use it, he would have acted in a way inconsistent with the covenants in the original lease, and I should have had no hesitation in granting an injunction against him; but he has done nothing of the kind, and the case made against him is that by standing by and allow-

(1) 2 Ph. 774.

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ing the house to be used for the exhibition of wild beasts, he has acted in violation of the covenant. I give no opinion whether the Plaintiff would have had a right of action against him if he had been bound in law by the covenant. There is no doubt that under the principle of *Tulk* v. *Moxhay* (1), if a man had actually done anything in contravention of the covenants of which he had notice, the Court would grant an injunction. As I understand *Tulk* v. *Moxhay*, the principle there laid down was that if a man bought an underlease, although he was not bound in law by the restrictive covenants of the original lease, yet if he purchased with notice of those covenants the Court of Chancery could not allow him to use the land in contravention of the covenants. That is a sound principle. If a man buys land subject to a restrictive covenant, he regulates the price accordingly, and it would be contrary to equity to allow him to use the land in contravention of the restriction. But here the Plaintiff does not seek to restrain *Ewin* from using the house in a particular way, or from doing something which will enable the tenant so to use it, but to compel him to bring an action against his tenant who is in possession of the house. The principle of *Tulk* v. *Moxhay* has never been carried so far except in a case before Vice-Chancellor *Malins*: *Cooke* v. *Chilcott* (2). The question came practically before the Court of Appeal in *Haywood* v. *Brunswick Permanent Benefit Building Society* (3), and the Court there laid down that the principle in *Tulk* v. *Moxhay* was not to be applied so as to compel a man to do that which will involve him in expense. The covenant in *Haywood* v. *Brunswick Permanent Benefit Building Society* was to repair buildings on the land, and was therefore as much with reference to the land as the covenant in this case, but the Court would not compel the defendant, who was the assignee of the original grantee, to repair the buildings. There is no evidence in this case that the Defendant *Ewin* has given any licence to his tenant to do the act complained of. I think it would be wrong to make an order that would have the effect of compelling him to bring an action, or of making him liable to damages if

(1) 2 Ph. 774.
(2) 3 Ch. D. 694.
(3) 8 Q. B. D. 403.

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he did not bring an action. It is said that he did nothing to prevent the use of the house in the way complained of. But before the action was brought it appears from the evidence that the clerk of the Plaintiffs' solicitor called at the house of the Defendant *Ewin*, and that *Ewin* informed him that he would see *McNeff* about the matter, and then the Plaintiff himself puts in evidence a letter from *McNeff* saying that out of respect to *Ewin's* wishes he had stopped the exhibition. It is true that the statement of *McNeff*, that the exhibition was closed, was false, but the Plaintiff has not proved that it was false that *Ewin* had requested him to stop it. So that on the evidence it stands that there is no proof that the Defendant gave permission to his tenant to open the exhibition, but it does appear that he spoke to him and requested him to discontinue it. I think it would be wrong to grant an injunction against *Ewin* under these circumstances. The injunction against him must therefore be discharged.

With respect to the costs, I was at first of opinion that, having regard to the fact that *Ewin* did not answer the letters sent to to him by the Plaintiffs' solicitor, the action ought to be dismissed against him without costs; but considering the fact that before the action was brought the clerk of the solicitor was told that the Defendant was doing something to induce his tenant to stop the exhibition, I think we cannot do otherwise than dismiss the action against him, with costs, in the usual way.

LINDLEY, L.J.:—

It is not contested in this case that the Defendant *McNeff* was in possession of the house in the *Edgware Road*, and was using it in contravention of the covenant in the original lease by keeping lions there. I assume, therefore, that Mr. Justice *Kekewich* was right in his finding as to the facts of the case. There is also no doubt that the Plaintiff could not have been sued at law for a breach of the covenant, nor is there any doubt that the principle of *Tulk* v. *Moxhay* (1) applies to this case. No one has disputed that. But how does the principle apply to a person in the position of *Ewin*? What has he done? He has not used the property in

(1) 2 Ph. 774.

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violation of the covenant; in fact he has done what he could, short of bringing an action, to prevent the violation of the covenant by his tenant. I think that the interview between his clerk and the solicitor's clerk on the 12th of March, coupled with the letter of the 15th from *McNeff*, shews that *Ewin*, who was ill at the time, did object to the use of the house in violation of the covenant. There is no ground for suggesting that *Ewin* was colluding with *McNeff* or consenting to his carrying on the offensive business. What, then, are the rights of the Plaintiff in this case? The covenant in the original lease is as follows. [His Lordship read the covenant.] The Plaintiff is entitled to the benefit of this covenant so far as the rules of law and equity permit; the part on which he relies is that in which the lessee binds himself not to permit or suffer the premises to be used for carrying on an offensive business, and he says, "I do not say you are carrying on an offensive business yourself, but that you are suffering your under-tenant to do so." It is important to bear in mind that *Ewin* is not an assignee of the original lease, and is not bound at law by the covenants. It is true that the distinction between an assignee and an under-lessee of the term, less a few days, is a very nice and technical one, but we cannot help that; we cannot hold that *Ewin* is bound at law by any covenant, nor can he be made liable for damages in any action at law. Therefore the Plaintiff is driven to bring him within the principle of *Tulk* v. *Moxhay* (1). I do not think that he has succeeded in doing so. This is an attempt to extend the principle of that case beyond its proper limits, and I think that such attempt ought not to be encouraged. The principle of *Tulk* v. *Moxhay* rests on good sense, but it imposes a burden on the land, and when it is sought to extend the principle to a person who is doing nothing himself in violation of the covenants in the lease I do not think it ought to be so extended. The very considerations which induced the Court of Appeal in *Haywood* v. *Brunswick Permanent Benefit Building Society* (2) to refuse to extend the principle apply here, although that was a case of a conveyance in fee simple, and this is one of a lease. I am of opinion that it would not be right to hold *Ewin* liable beyond his legal liability. It would not be right

(1) 2 Ph. 774. (2) 8 Q. B. D. 403.

C. A. 1887 HALL v. EWIN.

to make an order compelling him to bring an action against his under-tenant. I am not aware of any case in which this has been done. In *Attorney-General* v. *Guardians of Poor of Union of Dorking* (1) Sir *G. Jessel*, M.R., protested against any such order being made.

LOPES, L.J.:—

An action at law is not maintainable in this case. But according to the decision in *Tulk* v. *Moxhay* (2) a Court of Equity will not permit property to be used in a manner inconsistent with the restrictions to which it is subject, and with notice of which the purchaser acquired it. The present case depends on the evidence. I cannot see any breach of covenant on the part of *Ewin*. I can quite understand that if *Ewin* had let the house to *McNeff* with notice of the purpose for which it was to be used, an injunction might have been rightly granted, or if it had been proved that he had seen the mode in which the premises were being used and had expressed his approval of it, in that case also an injunction would have been right. But nothing of this kind has been proved. There is no evidence of any sort that he knew the purpose for which it was being used. It is not inconsistent with the evidence that as soon as he heard of it he did what he could to prevent its being so used. In my opinion the evidence certainly fails to shew any breach of the covenant on his part.

But it is said that the words of the covenant are, that he would "not permit or suffer" the house to be used for an offensive business. It appears to me that we are asked to interpret those words as if they were "hinder or prevent." The covenant might, indeed, have been worded in that manner if the parties had thought fit, and then it might have been the duty of *Ewin* to prevent the house from being improperly used. I express no opinion as to the effect of such a covenant, if *Ewin* had been an assignee of the lease and an action at law could have been brought against him. This appeal must be allowed with costs.

Solicitor for Appellant: *J. H. Hortin.*

Solicitors for Respondents: *Aston & Hughes.*

(1) 20 Ch. D. 595. (2) 2 Ph. 774.

M. W.

In re NORTH BRAZILIAN SUGAR FACTORIES.

C. A. 1887 Nov. 11.

Practice—Winding-up—Companies Act, 1862, *s.* 156 [*Revised Ed. Statutes, vol. xiv., p.* 236]—*Inspection of Documents.*

The power given by the *Companies Act*, 1862, s. 156, of ordering inspection of the books and papers of a company which is in course of winding-up is *primâ facie* to be exercised only for the purposes of the winding-up, and for the benefit of those who are interested in the winding-up, and will not in general be exercised for the purpose of enabling individual shareholders to establish claims for their personal benefit against the directors or promoters.

The section only applies to books and papers in the possession of the company, and does not enable the Court to decide any question of right against third parties who have the books in their possession and claim to be entitled to such possession.

Decision of *Charles*, J., affirmed.

THE company was registered on the 27th of May, 1882, with a nominal capital of £450,000, in £20 shares. In November, 1882, this was increased by special resolution to £700,000, and a power of borrowing up to £505,000 was given to the board, instead of a power of borrowing up to £20,000, which was given them by the articles. A large sum was borrowed on debentures.

The company having sustained heavy losses, and made default in payment of interest on its debentures, the debenture-holders brought an action in which, in 1887, a receiver was appointed. An extraordinary resolution was passed on the 7th of June, 1887, to wind up the company, and to sanction a scheme which was laid before the shareholders at the same time.

The short effect of the scheme was that a new company should be incorporated to acquire all the assets of the old company, and that the liquidator should sell to the new company all the concessions, lands, tramways, factories, buildings, machinery, plant, chattels, money, and things in action of the old company, and the undertaking and business of the old company, with the full benefit of all contracts and agreements and of all securities to which the old company was entitled, and all other the real and personal property of the old company. The purchase-money was to be paid in fully paid-up shares of the new company.

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On the 25th of June, 1887, an order was made continuing the winding-up under supervision.

The new company was formed and an agreement for sale to the new company of all the assets of the old company on the terms mentioned in the scheme was entered into on the 29th of July, 1887, subject to the approbation of the Judge and to such approval as required by the *Joint Stock Companies Arrangement Act*, 1870.

The approval required by the *Joint Stock Companies Arrangement Act* was obtained at a meeting held on the 25th of July, 1887; and on the 11th of August, 1887, an order was made sanctioning the scheme and the agreement for sale, though several debenture-holders appeared and opposed.

Many of the shareholders were extremely dissatisfied with the way in which the affairs of the company had been managed, and they appointed six of their number as a committee of investigation. The liquidator, who had been the secretary of the company from the first, not being willing to allow inspection of the books and papers of the company, the members of this committee on the 17th of August, 1887, took out a summons returnable on the 30th, asking that they by their solicitors might be at liberty to inspect all the books, papers, and documents then in the custody, possession, or control of the company or the liquidator, and take copies of and abstracts from such books, papers, and documents at their own expense as they might be advised.

The liquidator, in opposition to this application, deposed that no books, papers, or documents of the company were in the custody, possession, or power of the company or of himself as the liquidator, all such books, papers, and documents having been handed by him to the new company.

On the 23rd of September Mr. Justice *Charles* refused the application. The Applicants appealed.

The Applicants alleged on affidavit that there were misleading statements in the prospectus, that illusory balance-sheets had been issued, and that the property of the company had been wasted by proceedings of the directors which were irregular, illegal, and *ultrà vires*.

Romer, Q.C., and *Alexander*, for the Appellants:—

This application was made under the *Companies Act*, 1862, s. 156, and the Court under that section will generally make an order for inspection where the debts of the company are large and the transactions complicated: *Ex parte Buchanan* (1). Here the debts are very large and the transactions very complicated. There appear to have been serious irregularities and even illegalities; and there is reason to believe that there are fraudulent statements in the prospectus. It is a case for full inquiry, and the formation of the new company is no bar: *Re National Financial Company* (2).

Millar, Q.C., and *G. T. Millar*, for the liquidator:—

We contend that under a winding-up no discovery ought to be given except for the purposes of the winding-up. Discovery may properly be sought for the purpose of putting contributories on the list, or for prosecuting claims against the directors or others which will increase the assets of the company. Here any claims on the part of the old company against the directors will go to the new company: *In re Park Gate Waggon Works Company* (3); the Applicants, therefore, have no interest in them. As to claims by individual shareholders against the directors, we say that they are without the scope of the powers of discovery given by the Act, as they do not concern the company. An inspection for the purpose of the winding-up is all that was intended.

[Cotton, L.J.:—Is there anything to confine the discovery to discovery for the purposes of the winding-up?]

Not in terms; but all the cases on the subject go on the discovery being for the purposes of the winding-up. Sect. 115 has been held to be so confined: *In re Imperial Continental Water Corporation* (4), which furnishes a very strong analogy. Then again there are no books in the possession of the liquidator, for they have all been handed over to the new company.

Alexander, in reply:—

The Applicants have an interest in recovering from the direc-

(1) 15 W. R. 99.
(2) 15 W. R. 499.
(3) 17 Ch. D. 234.
(4) 33 Ch. D. 314.

C. A. 1887 *In re* North Brazilian Sugar Factories.

tors sums which will go into the hands of the new company, for that will increase the value of their shares in the new company which they receive in lieu of the old. They have also individual claims against the directors of which they will practically be barred if they cannot obtain inspection. Suppose there are fraudulent statements in the prospectus, we cannot connect any of the directors with the issue of it unless we can get inspection of the company's books.

[Cotton, L.J.:—How can these books which have been handed over be treated as in the possession of the old company?]

They ought never to have been handed over, there being no order of Court for the purpose as required by sect. 155 of the Act. Many of them are manifestly books which cannot be wanted for the purposes of the new company, and might be recovered. The books, therefore, must be considered as under the control of the old company.

Cotton, L.J.:—

This is an appeal from a decision of Mr. Justice *Charles* refusing an application under the *Companies Act*, 1862, sect. 156, for inspection of the books and papers of the company. An order having been made for continuing the winding-up of the company under supervision, a scheme was proposed for the formation of a new company, which was sanctioned by the Court, and all the assets of the old company were made over to the new company. The winding-up therefore is at an end so far as regards increasing the assets of the old company, for whatever they could have obtained from the directors or otherwise must go to the new company. The liquidator has made an affidavit that none of the books of the company are in his possession, custody, or power, and that he has handed all of them over to the new company. I am not satisfied that he was wrong in doing so, for all the assets of the old company had been sold to the new company with the sanction of the Court, and I do not think that sect. 155 applies to such a case. It is urged that there were some of the books to which the new company could not be entitled. I do not think that this is made out. But suppose it to be so, I do

not think that sect. 156 enables the Court to decide any question of right as against persons other than the liquidator who have got the books, it only applies to books in the possession of the liquidator; here, before inspection could be ordered, proceedings would have to be taken to get the books back. An order for inspection in an action could not be made as to books in the possession of third parties, who claimed a right to possession of them.

But suppose these books were in the possession of the liquidator, would it be right to make an order for their inspection? I repeat as to this section what I said in *In re Imperial Continental Water Corporation* (1) as to sect. 115, that the powers given by it are *primâ facie* to be exercised for the purposes of the winding-up, and for the benefit of those who are interested in the winding-up. I do not say that in no case can inspection be ordered where it is not for the general benefit of the contributories, but *primâ facie* it is only to be ordered with a view to their general benefit. It is said that inspection here would be for the benefit of the shareholders in the old company, as it might lead to getting in assets which would increase the stock of the new company, and so increase the value of the shares in the new company which the old shareholders receive in lieu of their old shares, but I think that is too remote. The object of the application evidently is to obtain evidence in support of actions by individual shareholders for their own benefit against the directors, and that is not within the object of the section. The appeal in my opinion fails.

LOPES, L.J.:—

A conclusive objection to the application is found in the position of the books and papers. The words of the section are "books and papers in the possession of the company." I understand that to refer to books and papers which are in the manual possession of the company or under their power or in their control. These books and papers clearly are not so.

It is right, however, that I should express my opinion on the other point. The words of sect. 156 are wide. But it must be borne in mind that this section is found in Part IV. of the Act,

(1) 33 Ch. D. 314.

C. A. 1887 *In re* North Brazilian Sugar Factories. Lopes, L.J.

relating to the winding-up of companies, which tends to the conclusion that its powers were given to be used for the purposes of the winding-up, and the remark in *In re Imperial Continental Water Corporation* (1) on sect. 115 applies equally to this section, that its powers were given with a view to the more beneficial winding-up of the company. Now what is the object for which inspection is sought here? Not the more beneficial winding-up of the company, but a collateral object, the obtaining discovery to enable individual shareholders to bring actions against the directors or promoters. The appeal must be dismissed.

Solicitors for Applicants: *Emanuel & Simmonds.*
Solicitors for Liquidator: *Ashurst, Morris, Crisp, & Co.*

H. C. J.

C. A. 1887 Nov. 11, 16.

MACFARLANE *v.* LISTER.

[1875 M. 23A.]

Solicitor—Charge for Costs—Attorneys and Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28 [*Revised Ed. Statutes, vol. xiii. p.* 881]—*Priority—Solicitor acting for Mortgagor and Mortgagee.*

While a suit for redemption of a mortgaged estate was pending the Plaintiff mortgaged his interest in the estate to *D.* The Plaintiff's solicitor in the suit acted for both parties in this mortgage. A company had given notice to take the property compulsorily, but the price had not been ascertained. On the day of the execution of the mortgage to *D.* the Plaintiff wrote to his solicitors and their *London* agents a letter directing them to pay *D.'s* mortgage debt out of the first money that should come to their hands from the company, and the solicitors handed this letter to *D.* with the mortgage deed. After this the price of the land was ascertained by arbitration, in which arbitration the *London* agents acted as the Plaintiff's solicitors, and the price was carried over to the credit of the redemption suit, and left a balance after paying off the original mortgage debt. After this the solicitors and their *London* agents applied for an order charging the fund with their costs in the action and in the arbitration. *Stirling*, J., made an order giving them a charge, and decided that they were entitled to priority over *D.'s* mortgage:—

Held, on appeal, that the mere fact that the solicitors acted for *D.*, as well as for the Plaintiff, in the matter of the mortgage, did not disentitle them to priority.

In re Snell (2) distinguished.

But *held*, that the Plaintiff's letter was a direction to the solicitors that

(1) 33 Ch. D. 314. (2) 6 Ch. D. 105.

moneys to come to their hands from the property were to be applied in the first place in paying *D.*, and that they having forwarded this letter to *D.* were bound by the direction, and could not set up a claim of their own in opposition to it, and were in no better position as to moneys in Court than as to moneys which actually came to their hands, and that their charge must be postponed to *D.'s* mortgage:

Held, also, that the *London* agents had no right to a charge for costs of the action, as they were not the solicitors employed by the client, nor to a charge for the costs of the arbitration, as it was not a proceeding in a Court of justice.

ON the 21st of October, 1872, *Macfarlane* and *G. J. Lister* mortgaged in fee a dock and some adjoining lands at and near *Milford Haven* to secure £3000. This mortgage became vested in *John Lister*, who entered into possession. In 1875 *Macfarlane* brought his action for redemption against *John Lister* and *Buck*, the trustee in bankruptcy of *G. J. Lister*. *John Lister* put in a defence and counter-claim by which he claimed foreclosure, or in case of redemption a declaration of his title to two-thirds of the property.

On the 5th of July, 1877, an order was made for taking the usual accounts against *John Lister* as mortgagee in possession, the rest of the action to stand over till the certificate was made. No certificate was ever made.

Messrs. *Evans & Williams* acted as solicitors for the Plaintiff in this action, and Messrs. *Peacock & Goddard* were their *London* agents.

The *Milford Docks Company* had in 1876 given notice under their statutory powers to take the dock and the adjoining lands compulsorily. Negotiations as to the price proved abortive, and the value was not ascertained till 1882.

On the 11th of January, 1878, *Macfarlane* executed a mortgage to *Dryden* and *Gerard*, the trustees of his marriage settlement, of all his interest in the mortgaged property to secure £400 advanced to him out of the trust funds. Mr. *Evans*, a member of the firm of *Evans & Williams*, acted as solicitor for both parties in the matter of this mortgage. On the same day *Macfarlane* wrote a letter addressed to *Evans & Williams* and to *Peacock & Goddard* as follows:—

"I hereby irrevocably authorize and request you out of the first moneys that shall come to your hands from the *Milford*

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Docks Company in respect of the *Milford* and *Hakin* property belonging to myself and Mr. *John George Lister*, to pay to my settlement trustees, Messrs. *A. E. Dryden* and *T. Gerard*, the sum of £400, and all other moneys (if any) which shall be due on a certain indenture of mortgage of even date herewith and made between myself of the one part and themselves of the other part."

When the mortgage was completed Mr. *Evans* sent this letter to *Dryden* and *Gerard* along with the mortgage deed.

In 1880 *J. G. Lister's* bankruptcy was annulled, *Buck* was discharged from the action, and *John George Lister* made a party to it.

In 1882 the price to be paid by the *Milford Docks Company* was ascertained by arbitration. The company were in difficulties, and considerable delay took place, but ultimately an arrangement was come to in 1884 by which it was settled that the company should pay £600 for costs, pay *John Lister's* executors £5000 in respect of his mortgage debt, and pay £2000 into Court to meet the claims of *Macfarlane* and *John George Lister*, as owners of the equity of redemption, and any further sum that might be found due to *Lister's* executors. Messrs. *Peacock & Goddard* in these arbitration proceedings acted as the solicitors of *Macfarlane* directly, and not as agents for *Evans & Williams*.

The company accordingly paid the £2000 into Court in the matter of their Act, and an arrangement was come to between the parties as to its division. This arrangement was carried into effect by an order of the 2nd of April, 1887, made in the action and in the matter of the *Milford Docks Company*, by which £1400 was ordered to be paid to *Ann Lister* and *John George Lister*, who were the executors of *John Lister*, in discharge of their claim as executors, and of the claim of *John George Lister* in his own right; and the remaining £600 was ordered to be carried over to the credit of the action: "Account of the share of the Plaintiff, *W. H. Macfarlane*, in property sold to *Milford Docks Company*." All further proceedings in the action were stayed.

In July, 1887, Messrs. *Evans & Williams* and Messrs. *Peacock & Goddard* applied by summons in the action and in the matter of the *Milford Docks Company*, asking that it might be declared that

the Applicants as solicitors respectively employed by *Macfarlane* in the prosecution and defence of the action, and in proceedings in the matter, were respectively entitled to a charge upon the funds in Court standing to the last-mentioned account, for the taxed costs, charges, and expenses of the Applicants of or in reference to the above-mentioned action and matter as such solicitors as aforesaid, the said funds in Court having been recovered or preserved by the Applicants respectively within the meaning of the 28th section of the *Attorneys and Solicitors Act*, 1860; and asking taxation, and payment out of the funds in Court.

This summons was served on *Dryden*, the surviving mortgagee of 1878, and on the present trustees of *Macfarlane's* settlement.

On the 1st of August, 1887, Mr. Justice *Stirling* in Chambers made an order whereby, after expressing his opinion that the Applicants were entitled in priority to the mortgage of the 11th of January, 1878, he made a declaration in the terms asked for by the summons, and directed taxation and payment accordingly.

Dryden appealed, and the appeal was argued on the 11th of November, 1887.

H. M. Williams, for the appeal:—

I contend, first, that the Judge ought to have limited the charge to costs properly incurred: *Emden* v. *Carte* (1). Secondly, the order is too wide in giving the costs incurred in the arbitration. A charging order is to be made only for the costs in that particular action: *Ex parte Thompson* (2), and is to be made by the Judge in whose Court the proceedings took place: *In re Fiddey* (3). Moreover, by the express terms of the Act the costs for which a charge may be given are costs of proceedings in a Court of Justice, which costs in an arbitration under the *Lands Clauses Act* are not. Thirdly, the fact that the solicitors acted for the mortgagee, as well as for the mortgagor, debars them from setting up their charge against the mortgage: *In re Snell* (4). The letter of the 11th of January, 1878, written by the Plaintiff to his solicitors, and their forwarding it to the mortgagees, which amounts to an undertaking to act upon it, has the same effect.

(1) 19 Ch. D. 311.
(2) 3 L. T. (N.S.) 317.
(3) Law Rep. 6 Ch. 865.
(4) 6 Ch. D. 105.

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Yate Lee, for the solicitors:—

In re Snell (1) was decided on the ground of professional negligence. It was the duty of a solicitor acting for a mortgagee to get possession of the deeds for his client, and it was held that after completion he could not be heard to say that they were not in his possession as solicitor to the mortgagee. Here it is not a lien of the same kind that is claimed. Everybody who takes a mortgage of a fund in Court knows that it is subject to costs and takes subject to them: *Haymes* v. *Cooper* (2); *Jones* v. *Frost* (3). The cases of *Pilcher* v. *Arden* (4), *Hamer* v. *Giles* (5), and *Greer* v. *Young* (6) are all in our favour. There is no suggestion that we actively gave up our right.

[COTTON, L.J.:—Would not an independent solicitor for the mortgagees have told them that they must not lend their money unless all lien for costs was given up?]

The mortgagee was a skilled lawyer, and quite understood the position—he advanced the money to accommodate his relatives. Other solicitors besides *Evans* were interested—he could not take away their rights—even those of his own partners. The letter addressed to the solicitors, on which nothing was ever done, cannot alter their rights, moreover it only applied to money coming to their hands, which this money never did. All the cases go on the principle that a mortgagee can take nothing but what his mortgagor can give him. If there is anything in the nature of suppression which enables the mortgagee to say that if he had known the facts he would not have lent the money, he will have priority over the persons guilty of the suppression; but here nothing was concealed, and it is rather a case of the mortgagees misleading the solicitors, than of the solicitors misleading the mortgagees.

Williams, in reply.

1887. Nov. 16. COTTON, L.J.:—

This is an appeal by mortgagees from an order of Mr. Justice *Stirling*, so far as it declares the Respondents entitled to a lien on

(1) 6 Ch. D. 105.
(2) 33 Beav. 431.
(3) Law Rep. 7 Ch. 773.
(4) 7 Ch. D. 318.
(5) 11 Ch. D. 942.
(6) 24 Ch. D. 545.

C. A. 1887 MACFARLANE v. LISTER. Cotton, L.J.

the fund in Court in priority to the mortgage of the Appellants. The Appellants, who were the trustees of the Plaintiff's marriage settlement, lent to the Plaintiff £400, and took from him a mortgage on his interest in the real estate which was the subject of this action. In the preparation of this mortgage the country solicitors on whose application, as well as that of their *London* agents, the order was made, acted both for the mortgagor and the mortgagees, and when the transaction was completed they, on behalf of the Plaintiff, sent the documents to the mortgagees, along with a letter written by the Plaintiff, addressed to the solicitors and their *London* agents, in these terms: "I hereby irrevocably authorize and request you, out of the first moneys that shall come to your hands from the *Milford Docks Company* in respect of the *Milford* and *Harkin* property belonging to myself and Mr. *John George Lister*, to pay to my marriage settlement trustees, Messrs. *A. E. Dryden* and *T. Gerard*, the sum of £400, and all other moneys (if any) which shall be due on a certain indenture of mortgage of even date herewith, and made between myself of the one part and themselves of the other part." What is the effect of that letter? The Appellants contend that it prevents the solicitors from insisting on their lien as against the Appellants. It was contended on the other side that it applied only to moneys to come to the hands of the solicitors, which the money now in Court never did, and that at all events it could not prejudice the lien of Messrs. *Peacock & Goddard*, who are not shewn ever to have assented to the direction contained in the letter. Now it is true that this money never came to the hands of the solicitors, Messrs. *Evans & Williams*; but I think that they cannot be in a better position as to money in Court than as to money come to their hands. Having sent that letter on to the Appellants, they must be taken to have accepted the direction contained in it, and if moneys had come to their hands they would have been bound to apply them in paying the mortgagees. "Out of the first moneys that shall come to your hands" must mean that the moneys which should come to their hands were to be applied in the first place in making this payment, and their acceptance of that direction, to my mind, precludes them from asserting any lien which would prevent such payment. It is

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urged that this cannot affect the *London* agents. But in my opinion the order, so far as it purports to give a charge to the *London* agents, is wrong. The Act applies only to the case of a solicitor who "shall be employed to prosecute or defend any suit, matter or proceeding in any Court of Justice." "Employed" must mean employed by the clients. Now the *London* agent is not the solicitor employed by the client; he is employed by the country solicitor, and the country solicitor is the only person to whom a charge can be given. It is said that in some of the proceedings Messrs. *Peacock & Goddard* were the solicitors employed by the Plaintiff. But those were proceedings in respect of the arbitration with the dock company, and were not proceedings in respect of which a charge could be given under the Act, as it refers only to proceedings before a Court of Justice. Having regard, then, to the letter to which I have referred, I am of opinion that the order is wrong so far as it gives the lien of the solicitors priority over the mortgage of the Appellants.

It was pressed on us that, independently of this letter, the mere fact that Mr. *Evans* acted both for the mortgagor and the mortgagees would prevent his claiming a lien in priority to the mortgage, and *In re Snell* (1) was referred to. I am of opinion that the mere fact of the solicitors having acted for both parties would not prevent them from claiming priority for a charge which did not arise in respect of that particular transaction, but was a charge arising by the general law, of which everybody must be taken to have notice. In *In re Snell* the title deeds were in the hands of the solicitors who acted for both parties. Their duty as solicitors for the mortgagee was to obtain the title deeds for him, and it was held that they could not insist on a right which they could only acquire by neglecting their duty to him and retaining them as solicitors to the mortgagor. The declaration as to priority must be discharged, and there must be a declaration of our opinion that the mortgage has priority over the charge of the solicitors.

As this appeal is only against part of the order there is some difficulty in setting the order right. Probably after the mortgagees have been paid there will not be left more than enough

(1) 6 Ch. D. 105.

to pay the costs for which a charge can properly be given. But we ought to express our opinion that there are two points in which the order goes too far. It ought only to extend to costs incurred in the action in which the money was recovered, and not to costs incurred in the arbitration, and it is wrong in so far as it purports to give a charge to the *London* agents.

LOPES, L.J.:—

The question before us is whether the solicitors of the Plaintiff and their *London* agents have a charge on the fund in Court in priority to the mortgage of the Appellants. As regards the *London* agents, I think that no charge could be given to them under the Act. As regards the costs of the action they were not the solicitors employed by the client; and as to the costs of the arbitration in which they were employed by him, no charge could be given for those costs, as they were not incurred in proceedings in a Court of Justice.

As regards the costs of the country solicitors, I think the order would have been right had it not been for the letter read by the Lord Justice *Cotton*. I think that the true meaning of the words used is that the moneys received are to go in the first place to the mortgagees. This letter was written by the Plaintiff to his solicitors, and was forwarded by them to the mortgagees. In my opinion the letter was thus adopted by the solicitors, and precludes their setting up their charge in competition with the claim of the mortgagees.

Solicitor for Appellant: *W. Reeve.*

Solicitors for Respondents: *Peacock & Goddard,* agents for *Eaton Evans & Williams, Haverfordwest.*

H. C. J.

C. A.
1887
Nov. 18.

SOPER *v.* ARNOLD.

[1886 S. 3056.]

Vendor and Purchaser—Rescission—Forfeiture of Deposit—Defect in Title subsequently discovered—Action to recover Deposit.

A purchaser of land is not entitled to have the contract set aside for defect of title after completion, or after rescission consequent upon the purchaser's default.

The conditions in a contract for sale of land provided that the purchaser should pay a deposit, and that if he failed to comply with the conditions his deposit should be forfeited, and the vendors should be at liberty to resell. The purchaser paid the deposit, accepted the title and prepared draft conveyance, which was approved, but when the time for completion arrived he could not find the residue of the purchase-money. The vendors therefore rescinded the contract. Three years afterwards, on a sale to another purchaser, it was decided that the title of the vendors was bad, owing to a defect which appeared on the face of the abstract delivered to the first purchaser. The first purchaser thereupon brought an action to recover his deposit on the ground of mutual mistake and failure of consideration:—

Held (affirming the decision of *Kekewich*, J. (1)), that he was not entitled to recover the deposit.

Want v. *Stallibrass* (2) and *Hart* v. *Swaine* (3) distinguished.

ON the 4th of November, 1882, the Defendants, who were trustees for sale under the will of *B. A. Arnold*, contracted to sell a certain freehold property to the Plaintiff. The contract contained the common condition that if the purchaser failed to comply with the conditions his deposit should be forfeited to the vendors, who should be at liberty to proceed to another sale. The Plaintiff paid a deposit of £610. The title was accepted, and draft conveyance prepared, and approved by the Defendants. When the time for completion arrived the Plaintiff could not find the purchase-money. On the 13th of March, 1883, the Defendants served the Plaintiff with notice that if he did not complete within fourteen days they would rescind. He did not complete, and on the 27th of March, 1883, they gave him notice that they rescinded the contract. In 1885 they sold the property

(1) 35 Ch. D. 384. (2) Law Rep. 8 Ex. 175.
(3) 7 Ch. D. 42.

for less money to a purchaser who took an objection to the title of their testator on the ground that he had purchased under a power of sale which had not arisen. This defect appeared on the face of the abstract which had been delivered to the Plaintiff in 1882. Mr. Justice *Chitty*, in January, 1886, decided that this objection was well founded, and the sale went off. The Plaintiff then commenced the present action for repayment of his deposit with interest. Mr. Justice *Kekewich* gave judgment for the Defendants (1). The Plaintiff appealed.

J. M. Rigg, for the Appellant:—

A forfeiture clause in conditions of sale is only enforceable provided the vendor is able to give a good title: *Want* v. *Stallibrass* (2). That case appears to be undistinguishable from the present. There the conditions of sale provided that all objections must be taken within fourteen days from the delivery of the abstract, and that in default of the purchaser complying with the conditions his deposit should be forfeited. He allowed the time stipulated to elapse, and then took the objection that the vendors could not sell because their power of sale had not arisen. It was held that the purchaser could recover his deposit on the express ground there stated by Baron *Pollock*: "The right of a vendee to a good title is a right, not merely growing out of the agreement between the parties, but is given by the law. This is affirmed by Lord *St. Leonards*, Vendors and Purchasers (3), and is supported by the case of *Hall* v. *Betty* (4), and it would be putting a most unreasonable construction upon the conditions of sale to hold that the vendee, by failing to object to the abstract within the stipulated time, not merely waived any requirement as to further information or further security, which he might have properly enforced against a vendor who had a valid title, or one capable of being made valid, but that he became liable to accept a title wholly bad, when the very basis of the contract, apart from the conditions of sale, was that the vendor was bound to give a good title." This case by no means stands alone. It is established by a whole series of cases, dating

(1) 35 Ch. D. 384.
(2) Law Rep. 8 Ex. 175, 185.
(3) 14th Ed. c. 9, s. 1, p. 337.
(4) 4 Man. & G. 410.

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from the last century and continued to the present time, that even after a title has been accepted, and the conveyance executed, and the purchase-money paid, if the title turns out to be wholly or substantially bad the purchaser is entitled to rescission and a return of the purchase-money: *Bingham* v. *Bingham* (1); *Cooper* v. *Phibbs* (2); *Jones* v. *Clifford* (3); *Torrance* v. *Bolton* (4); *Hart* v. *Swaine* (5). The facts of *Bingham* v. *Bingham* are stated in *Belt's* Supplement to Ves. Sen. (6). It is clear that there was no element of fraud in the case. It was a case of simple common mistake as to the effect of certain limitations. The purchaser bought what was in fact his own property. The fact that he bought his own property was not material. The decision proceeded simply on the ground of mistake. So it was treated by Lord *Cottenham* in *Stewart* v. *Stewart* (7). He says: "If it were necessary to consider the principle of that decree, it might not be easy to distinguish that case from any other purchase in which the vendor turns out to have had no title. In both there is a mistake, and the effect of it in both is that the vendor receives, and the purchaser pays, money without the intended equivalent." The effect of *Cooper* v. *Phibbs* is very well stated by Mr. *Pollock* in his work on Contracts (8). In *Jones* v. *Clifford* the title had been accepted when the purchaser discovered that it was fundamentally bad. Notwithstanding a condition precluding him from making requisitions, relief was granted by Vice-Chancellor *Hall*, citing *Bingham* v. *Bingham* and *Cooper* v. *Phibbs*.

[COTTON, L.J.:—In *Jones* v. *Clifford* the contract was still *in fieri*.]

If it had been completed, there would still have been a right to rescind it: *Hart* v. *Swaine*.

[COTTON, L.J., referred to the observations of Lord *Selborne* in *Brownlie* v. *Campbell* (9).]

Hart v. *Swaine* and *Torrance* v. *Bolton* shew that there is no magic in the fact of a purchaser buying his own title. In

(1) 1 Ves. Sen. 126.
(2) Law Rep. 2 H. L. 149.
(3) 3 Ch. D. 779.
(4) Law Rep. 14 Eq. 124; 8 Ch. 118.
(5) 7 Ch. D. 42.
(6) Page 79.
(7) 6 Cl. & F. 911, 968.
(8) 2nd Ed. p. 428.
(9) 5 App. Cas. 937.

the first case the flaw was the existence of incumbrances not disclosed in the particulars. The title had been accepted, and the deposit paid down. Lord Justice *James* sustained the decision of the Court below, rescinding the contract, on the ground that the purchaser never knew what he was buying, and held that it was not necessary to prove fraud. In *Hart* v. *Swaine* (1) the flaw was that copyhold property was sold as freehold. There was no fraudulent misrepresentation, merely a *bonâ fide* mistake. Mr. Justice *Fry* granted relief, ordering the vendor to pay not merely the costs of the action, but the expenses incurred in respect of the contract. I submit, then, that the greater includes the less; that is, if we had gone on and completed the contract, we should on discovering the flaw have been entitled to rescission and a return of the purchase-money, so we are now entitled to the modest relief which we seek, and I ask for judgment against the Defendants for the deposit, with interest at 4 per cent., the costs of the action, and the expenses incurred in relation to the contract.

[LOPES, L.J., referred to *Howe* v. *Smith* (2).]

That case is distinguishable on the ground that in that case there was an enforceable contract; here there never was. The doctrine of constructive notice does not affect the case. In *Bingham* v. *Bingham* (3), *Cooper* v. *Phibbs* (4), and *Jones* v. *Clifford* (5), there was constructive notice of the most violent kind.

W. Barber, Q.C., *Vernon Smith*, and *Reginald Kemp*, appeared for the Defendant, but were not called upon.

COTTON, L.J.:—

This appeal before us has been very ably argued, but in my opinion the judgment of Mr. Justice *Kekewich* is right.

A contract to purchase was entered into between the Plaintiff and Defendants, and the Plaintiff paid a deposit of £610. After the abstract of title had been sent, and after it had been approved of by the purchaser, the time for payment of the residue of the

(1) 7 Ch. D. 42.
(2) 27 Ch. D. 89.
(3) 1 Ves. Sen. 126.
(4) Law Rep. 2 H. L. 149.
(5) 3 Ch. D. 779.

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purchase-money arrived. As the Plaintiff himself states in his statement of claim, when that time had arrived he was not able to produce the balance of the purchase-money. In consequence of that the vendors rescinded the contract and forfeited the deposit. Some years afterwards the Plaintiff discovered from proceedings in another action that the title was a bad one, and that if he had taken an objection to the title he might have resisted specific performance. If he had done so and the contract had gone off on that ground, then he would have been entitled to get back his deposit, but the contract did not go off on that ground, it went off on the footing that the purchaser, who was satisfied with the title shewn him, and was willing to take a conveyance in accordance with that title, was not able to provide the balance of the purchase-money, which under the contract had become payable, and therefore the contract went off on his own default. In consequence of that default the vendors rescinded the agreement and forfeited the deposit of £610. On what ground is the Plaintiff to get it back? The case is not one where the contract is still *in fieri*, and the vendor or the purchaser is insisting on specific performance; but one where the vendors had, in consequence of the default of the purchaser, put an end to the contract as far as they could, and claimed to retain the deposit. Under those circumstances the purchaser is in the position of a man who has repudiated his contract. It is true that if he had understood the law he would have taken a different ground and not have said, "I accept the title and am ready to complete and take a conveyance;" but he would have said, "you cannot enforce specific performance because you have no title, and I will not complete." If he had taken that line he would have been entitled to a return of his deposit. But to allow him under existing circumstances to recover the deposit would be to enable him to take advantage of his own default in not providing the balance of the purchase-money after the title had been accepted and the draft conveyance settled. That he did accept the title was owing to the mistake of his advisers, for we must take it that the decision of Mr. Justice *Chitty* was correct, and that the vendors had not a good title, but the mistake of his advisers does not give him any rights.

Want v. *Stallibrass* (1) was quoted as decisive in favour of the Appellant, but that was an entirely different case. There, the default of the purchaser was in not delivering his objections in due time, and the vendor said, "You have not delivered your objections within the period limited by the conditions, therefore you cannot take an objection to the title at all, and moreover, the objection is a bad one." On this the parties joined issue, and there never had been any repudiation of the contract by the vendor. Both parties were unwilling to move; the vendor, because he was not quite certain of the title, and the purchaser because he was not certain of his position: but at last, after nearly six years, the purchaser brought an action for the return of his deposit. Under those circumstances the decision, I think, really went upon this—that there was no default on the part of the purchaser within the meaning of the conditions of sale as properly construed, and that therefore the case must be treated independently of those conditions, and independently of the stipulations that in the event of the contract not being completed, or there being a breach of the conditions, the vendor should be at liberty to retain the deposit. And then it comes to this—here is a vendor who has no stipulation on which he can rely giving him a right to retain the deposit—the contract goes off, not from any default of the purchaser, but from the default of the vendor, who has not a good title, therefore the purchaser is entitled to claim back the deposit.

Then it is said that here, even if there had been a completion by conveyance to the Plaintiff, he ought, on afterwards discovering the badness of the title, to get the money back again. Cases were quoted to shew that the rule *ignorantia juris quod quisque tenetur scire neminem excusat* does not apply to a case like the present. Assuming that to be so, where is there an authority that after the conveyance taken and the money paid, the purchaser who has taken the conveyance and accepted the title can, merely because he afterwards finds out in consequence of his being ejected that the title is a bad one, recover the purchase-money? In my opinion that is not the law. What is the use of covenants for title, and what is the use of limiting covenants for title, if whenever any purchaser who has taken a conveyance is ejected

(1) Law Rep. 8 Ex. 175.

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he can come to the vendor and say, "Take back the estate for what it is worth and give me back my money"? Some cases were referred to. I do not think that *Jones* v. *Clifford* (1), before Vice-Chancellor *Hall*, has any bearing upon this case. The question there was, how far, while the contract was still *in fieri*, the vendor was at liberty to correct a mistake he made in stating that he was selling freeholds when he had only a leasehold interest, and how far the purchaser was entitled to correct the mistake he made in accepting the title under a misapprehension.

It was argued that *Hart* v. *Swaine* (2) supports the view that even if there had been a conveyance the money could be got back again if the title was bad. In my opinion that is not the decision. The Judge there decided that there had been a misrepresentation amounting to legal fraud on the part of the vendor, and he treated the action as an action for deceit, and considered that the proper remedy was to give back to the purchaser his money and to let the vendor get back his estate. Whether that is right or wrong may have to be considered hereafter, and whether or not the authorities justified the learned Judge in coming to that conclusion is a point we have not now to consider; but certainly the judgment did not lay down a general proposition of law that where in the absence of any deceit the title turns out to be bad after conveyance the purchaser is entitled to say to the vendor: "Give me back my money and take back your estate." I think that is not the general law, and I am fortified in that view by what was said by Lord *Selborne* in *Brownlie* v. *Campbell* (3), where there occurs this passage: "When the conveyance takes place it is not, as far as I know, in either country the principle of equity that relief should afterwards be given against that conveyance, unless there be a case of fraud, or a case of misrepresentation amounting to fraud, by which the purchaser may have been deceived." In my opinion, therefore, the judgment of Mr. Justice *Kekewich* was right, and we must dismiss the appeal.

SIR J. HANNEN:—

I am of the same opinion. The learned counsel, by whom this case has been very well argued, put it on a ground which if he

(1) 3 Ch. D. 779. (2) 7 Ch. D. 42.
(3) 5 App. Cas. 925, 937.

could have substantiated it would have supported his contention, viz., that the circumstances were such as to make it inequitable on the part of the Defendants to retain this money, but it appears to me to be absolutely clear that it is not so. There was no misrepresentation, no concealment of any fact, but the facts which were disclosed satisfied the advisers of the Plaintiff at that time, and the title was approved of. There was no common mistake of facts going to the root of the contract as in some of the cases which have been referred to. It was a mistake of opinion as to the validity of the title, a mistake which I suppose occurs in innumerable cases. Under the influence of this mistake of opinion the advisers of the Plaintiff accepted the title, but he did not pay the money in fulfilment of the contract. That was a repudiation of the contract which the Defendants were justified in acting upon, and they accordingly rescinded the contract. It appears to me that it would in that state of things be highly inequitable that, because somebody else discovers years afterwards that the opinion acted upon at the time was erroneous, the Defendants should be bound to return this money. Therefore I think the judgment of Mr. Justice *Kekewich* is right.

LOPES, L.J.:—

The facts to my mind conclude this case. The facts are plainly set out in the statement of claim, and it there appears that an abstract was duly delivered, such abstract disclosing the title truly. The Plaintiff's solicitor approved of the title, and then when the time arrived for the payment of the purchase-money the purchaser was either unable or unwilling to find the money. In point of fact he did not find it. Notice was then given by the vendors to rescind. There was a rescission, and the whole matter was then and there at an end. Years go by, and when the vendors endeavour to sell the property to somebody else it is discovered there is this defect in the title. That comes to the knowledge of the present Plaintiff, and he then brings this action in order to recover his deposit. Is he entitled to recover it? I am clearly of opinion that he is not. To hold him entitled would be enabling him to take advantage of his own default.

I do not propose to discuss the cases which have been cited, as

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they have been fully dealt with by Lord Justice *Cotton*, and every one of them is distinguished from the present case.

Solicitor for Plaintiff: *Granville Smith.*
Solicitors for Defendants: *Lovell, Son, & Pitfield.*

H. C. J.

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[1876 P. 111.]

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[1876 E. 85.]

Writ of Attachment—Defaulting Trustee—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 3 [*Revised Ed. Statutes, vol. xvi., p.* 112.]

By an order of June, 1878, compromising an action brought to recover from *B.* moneys which he had borrowed from *A.* at interest, *B.* "by his counsel admitting that the principal sum in his hands claimed in the action amounted to £——," it was ordered in effect that he should hold £1700, part thereof, on certain trusts, and should be at liberty to retain it during the life of *C.*, paying interest for it, and liberty was given to apply for payment of the principal and interest if default was made in payment of interest. Default having been made, *B.* in 1887 was ordered to pay the money into Court, and on his failing to do so leave to issue an attachment was applied for. He deposed that when the order of 1878 was made he had not in his hands any money or investments representing the sum owing from him or any part thereof:—

Held (affirming the decision of *Kekewich*, J.), that although *B.* up to the order of 1878 was only a debtor and not a trustee, he must, having regard to his admission, be held upon the making that order to have had the money in his hands as trustee—that he therefore came within the exception in sect. 4, sub-sect. 3 of the *Debtors Act*, 1869, and was liable to attachment for non-payment.

THIS was an appeal from an order for attachment made by Mr. Justice *Kekewich*.

In 1859 *Etherington* lent to the Appellant a considerable sum of money at interest, and afterwards lent him some further sums.

On the 31st of March, 1876, *Etherington* assigned to *Preston* all his personal estate upon trusts for the benefit of himself, his wife and children. On the 5th of May, 1876, *Preston, Ether-*

ington and Mrs. *Etherington* commenced an action against the Appellant for an account and payment of the moneys due from the Appellant to *Etherington*. The children of *Etherington* were afterwards added as co-Plaintiffs.

In the same year *Etherington* commenced an action against his infant children, his wife, and *Preston* to have the settlement of the 31st of March, 1876, set aside.

On the 7th of June, 1878, both actions came on for trial, and a compromise was proposed, which was sanctioned by the Court on behalf of the infants. An order was accordingly made in both actions, whereby the Appellant "by his counsel admitting that the principal sum in his hands claimed by the Plaintiffs in the first mentioned action amounts to £4147 6*s.* 1*d.*," it was ordered that the settlement should be set aside, and that the Appellant "do out of the said £4147 6*s.* 1*d.* so in his hands," retain and pay certain costs, and after such payments and retentions divide the residue of the said sum of £4147 6*s.* 1*d.* into moieties, and hold one of such moieties for *Etherington* upon the terms and according to the arrangements therein mentioned. And it was ordered that the Appellant "do stand possessed of the other moiety of such residue upon trust" to pay interest thereon at the rate of £5 per cent. per annum to *Clara Powell* (formerly the wife of *Etherington*) during her life for her sole and separate use, to be taken by her in full satisfaction of all claims for alimony, and after the determination of that trust it was ordered that the Appellant should stand possessed of the last-mentioned moiety in trust for such of *Etherington's* children by *Clara Powell* as being sons should attain twenty-one, or being daughters should attain that age or marry, and in default of such children upon the trusts therein mentioned: And it was provided that the principal of the last-mentioned moiety was not to be called in or required to be paid off until after the death of *Clara Powell*, and in case of the children attaining a vested interest their attaining such interest. It was further provided that in the event of the Appellant's death the money might be called in at once. Liberty was given to *Clara Powell* and the infants to apply to the Court or in Chambers for payment of principal and interest of the last-mentioned moiety in case of non-payment of the interest. All

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proceedings in the action were stayed except for the purposes of the order.

The moiety amounted to £1710.

On the 8th of July, 1887, the interest being in arrear, an order was made for the Appellant to pay the £1710 into Court, and to pay *Clara Powell* (now *Clara Price*) £42 15*s.* in respect of interest.

This order not having been complied with, application was made to Mr. Justice *Kekewich* as Vacation Judge by Mrs. *Price* for leave to issue a writ of attachment.

The Appellant by his affidavit in opposition to this application deposed that at the time when the order of the 7th of June, 1878, was made, he was owner of an equity of redemption which he believed to be worth £4000; that he then fully believed that he should be able to comply with the terms of the order, and that the admission that he had the £4147 6*s.* 1*d.* in his hands, as he understood it "merely implied and was intended to imply that the sum of £4147 6*s.* 1*d.* was the amount due from me in respect of the aforesaid loan." He went on to say that at that time "it was certainly known to the advisers of the Plaintiffs in both actions, as the facts were, that at that time there was not any actual money or any investment in my hands representing the said sum of £4147 6*s.* 1*d.* or any part thereof." He proceeded to state in detail his pecuniary circumstances, and deposed to his utter inability to comply with the order of the 8th of July, 1887.

On the 24th of August, 1887, Mr. Justice *Kekewich* as Vacation Judge made an order giving Mrs. *Price* leave to issue an attachment. The appeal from this order was heard on the 9th of November, 1887.

Cozens-Hardy, Q.C., and *Chubb*, for the Appellant:—

We contend that this case is not within the 3rd exception in the *Debtors Act*, 1869, s. 4. What was intended to be hit at was a case of misappropriation of trust money which a trustee appropriated instead of investing it; here the money was never in the Appellant's hands as trust money. The Appellant was not a trustee at all till the order of the 7th of June, 1878, which made

him one; up to the making of that order he was only a debtor. The exception does not apply to every sum which a trustee *quâ* trustee is liable to pay. He must have had the money in his hands. Thus a sum for which he is made liable on the ground of wilful neglect and default is not within the exception: *Ferguson* v. *Ferguson* (1). The leading case on the subject is *Middleton* v. *Chichester* (2), which shews that the object of the exception is to deal with a trustee who has dealt with trust money in a way which makes a breach of trust. He must have had it in his hands as trustee and then dealt improperly with it. He cannot *ex post facto* be turned, as it is proposed to do in the present case, from a mere debtor into a fraudulent trustee. Then, again, the order which makes the Appellant a trustee authorizes him, and in fact directs him, to retain the money in his hands.

[COTTON, L.J.:—Till the Court otherwise orders, and the Court has otherwise ordered.]

No doubt the Appellant is liable to pay, but what we rely on is that mixing the money with his own moneys was not a breach of trust as is usually the case.

[COTTON, L.J.:—Is not the recital in the order an admission that he had the money in his hands?]

He explains that admission in his affidavit; all he meant to admit was that that amount was what he was liable to pay. In order to bring him within the exception there must be a misappropriation of trust money. As Lord *Hatherley* says in *Middleton* v. *Chichester* (3), there must be something in the nature of delinquency. This money was never in the Appellant's hands as trust money. If the debtor had been a third person the Appellant could not have been sent to prison for not getting it in, and he ought not to be so, because he unites the characters of trustee and debtor. But suppose we are within the exception, the Act 41 & 42 Vict. c. 54, s. 1, gives a discretion as to attachment, and it should, in a hard case like this, where there was no misappropriation, be exercised in our favour. The Judge has not exercised his discretion on the point.

(1) Law Rep. 10 Ch. 661. (2) Law Rep. 6 Ch. 152.
(3) Law Rep. 6 Ch. 157.

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[It appeared that the later statute had been referred to before Mr. Justice *Kekewich*, and the Court held that if he had jurisdiction to attach his discretion could not be interfered with. *Crowther* v. *Elgood* (1) was referred to.]

E. Cutler, Q.C., and *Whiteway*, for Mrs. *Price*:—

A debt is eminently "within the control" of the debtor, so the case is within the words of the exception. A man who owes trust money has trust money under his control. It is sought to make out from *Middleton* v. *Chichester* (2) that to bring a case within the exception there must be fraud, but Lord *Hatherley* does not say that; it is only said that something in the nature of delinquency was struck at by the exception.

[COTTON, L.J.:—Do you say that the debtor had means to pay or not when the order of June, 1878, was made?]

We have no evidence, and we contend that we are not bound to go behind the order. The evidence rather tends to shew that he had. If he had not he was deceiving the Court, which would never have made this order except on the assumption that he was able to pay, and in fact he admitted that he had this sum in his hands. Moral delinquency is not necessary, as is exemplified by *Evans* v. *Bear* (3), a case somewhat resembling the present. In *In re Strong* (4) the question is discussed what time is to be looked to. [*Marris* v. *Ingram* (5) was also referred to.]

Cozens-Hardy, in reply:—

It is plain on the evidence that the Appellant had not the money in his hands ready to be repaid when the order of June, 1878, was made. It is said that the Court would not have sanctioned the compromise except on the understanding that he had it. But if he had been able to repay at once this sum, which belonged to infants, the Court would never have sanctioned his retaining it; the order must have been made on the supposition that he was not able to pay, and that an order which would not make him bankrupt at once was the best thing for the *cestuis que*

(1) 34 Ch. D. 691.
(2) Law Rep. 6 Ch. 152.
(3) Law Rep. 10 Ch. 76.
(4) 32 Ch. D. 342.
(5) 13 Ch. D. 338.

trust. We rely on this, that the money must have been received by the trustee as trustee. Suppose a person who owes money to a trust estate so as to be a simple debtor is afterwards appointed trustee, could it be held that he is brought within the exception?

COTTON, L.J.:—

This is an appeal from an order of Mr. Justice *Kekewich* giving leave to issue an attachment. The Appellant has contended that in the exercise of the discretion given by 41 & 42 Vict. c. 54, we ought not to send the Appellant to prison. But Mr. Justice *Kekewich* had that discretion given to him, and must be taken to have exercised it. He exercised it in a way which the Appellant does not like, but he did exercise it, and if the case is one where he had jurisdiction to authorize an attachment, we cannot interfere with his discretion in the exercising of it. The only question, therefore, which we have to consider is whether the Act gave him that jurisdiction.

The Appellant in 1859 borrowed money from *Etherington* at interest. In 1876 *Etherington* made a settlement by which he assigned this debt and other property to a trustee. The trustee brought an action to make the Appellant pay what he owed. Another action was brought to set aside the settlement. An order of compromise was made in 1878 under which the Appellant became trustee of a moiety of the sum due from him. In July, 1887, he was ordered to pay this moiety into Court. Now undoubtedly the mere relation of debtor and creditor does not bring a case within the third exception in sect. 4 of the *Debtors Act*, 1869, and the question is whether the sum which he was thus ordered to pay was ever money in his possession or under his control as trustee. To my mind it must be treated as having been so. The order of the 7th of June, 1878, was a special one, it not only compromised the action for setting aside the settlement, but also the action against the debtor. It was made on the debtor "by his counsel admitting that the principal sum in his hands claimed by the Plaintiffs in the first mentioned action amounts to £4147," and it directed that after payment of certain costs out of that sum he should stand possessed of a moiety of the residue upon trust to pay the interest to *Etherington's*

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wife for her life, and then for the children of the marriage. He was allowed to retain the money in his hands during the life of the wife, but if he failed in payment of the interest liberty was given to apply for payment of principal and interest. When this order was made he became a trustee, but it is urged that he never had this money in his hands as trustee. I think the Court would never have made the order except on the footing that his admission was a statement that he had means to provide the money if he was called upon to pay it, and if he had such means, then in my opinion he had this money in his possession or control within the meaning of the Act. I think that sect. 4, subsect. 3, is satisfied if at the time when the order of the 7th of June, 1878, was made, he had in his possession property sufficient to enable him to make the payment. He states by his affidavit that he had not at that time any actual money or any investment in his hands representing the £4147, but I do not find any statement that he had not in his hands the means of paying that sum in full. I must take it, therefore, that at the time when he became a trustee of the money he had it in his hands. It was urged that there could be no case for attachment where the trustee had been authorized by the Court to retain the money in his own hands without investing it. But he was only authorized to retain it in his hands till the Court, on his making default in payment of interest, should otherwise order, and the Court has otherwise ordered. He made default in payment of interest, and the Court refused to allow him to retain it, it thereupon ceased to be a sum which the Court allowed him to retain. In my opinion the case is within the exception. That a person may be liable to attachment under the exception it is not necessary that he should have been guilty of fraud. One object of the Act is stated to be the punishment of fraudulent debtors, but we cannot on that ground confine to cases of fraud the exceptions made by the Act from the protective clause in favour of debtors.

LOPES, L.J.:—

The question is whether this is a case of default by a trustee ordered to pay by a Court of Equity a sum in his possession or under his control. The Appellant takes the point that he never

had it in his hands as trustee, and is therefore not within the exception in sect. 4, sub-sect. 3. Had he it ever in his hands as trustee? That depends on the evidence. The order of June, 1878, was made on the admission by him "that the principal sum in his hands claimed by the Plaintiffs in the first mentioned action amounts to £4147." That is a clear admission that he had the money in his hands. The basis of the arrangement was that he had in his hands the money, or its equivalent—the means of satisfying it. There is, therefore, strong evidence that he had the money in his hands at the date of the order, and there is no material evidence the other way. I am of opinion, therefore, that he is within the exception. I agree with Lord Justice *Cotton* that it is not necessary to make out a case of fraud to bring a case within the exception, and I also agree that we cannot interfere with the exercise of the discretion of Mr. Justice *Kekewich*.

Solicitor for Appellant: *A. B. Chubb.*
Solicitors for Respondent: *Boxall & Boxall.*

H. C. J.

KAY, J.
1887
Nov. 18.

In re HANSON'S TRADE-MARK.

[1887 H. 3947.]

Trade-mark—Registration—"Distinctive Device"—Colour—"Fancy words not in common use"—Patents, Designs and Trade Marks Act, 1883, *ss.* 64, 67.

Under sect. 67 of the *Patents, Designs and Trade Marks Act*, 1883, a trade-mark may be registered in any colour or colours; but having regard to sect. 64, it must be a trade-mark that is distinctive independently of colour. A trade-mark of which the only distinction is colour cannot be registered.

In 1872 *H.*, a wholesale grocer, commenced using, for French coffee, a red, white and blue label, and in 1881 he registered it under the *Trade Marks Registration Act*, 1875, in Class 42, for "coffee" only. The label as registered was shaded so as to represent three colours, across it being printed the words "*Red, White and Blue.*" After the passing of the *Patents, Designs and Trade Marks Act*, 1883, *H.* applied for the registration of a red, white and blue label (in colours) for the whole of the goods in Class 42, but the Comptroller refused to register the label as not being sufficiently distinctive.

On a motion by *H.* for an order on the Comptroller to proceed with the registration:—

Held, that, having regard to sects. 64, and 67 of the Act, the label was not capable of registration as it possessed no distinctive character independently of the colours.

An application to proceed with the registration of the words "*Red, White and Blue*," as "fancy words not in common use" within the meaning of sect. 64, was also refused.

THIS was a motion on behalf of Sir *Reginald Hanson* and another, trading as *S. Hanson, Son & Barter*, wholesale grocers, for an order directing the Comptroller-General of Patents to proceed with the registration of a trade-mark.

In 1872 the then firm commenced using, for French coffee, a red, white and blue label in imitation of the French tricolour, and in 1881 they registered it under the *Trade Marks Registration Act*, 1875, in Class 42—"Substances used as food, or as ingredients in food"—in connection with "coffee" only. The Act not allowing colours to be registered, the device as registered was an oblong label in three parallel stripes of about equal width, the two outer stripes being shaded, and the middle stripe being

white, or unshaded. Upon it were printed the words "*Finest French Coffee*" below them "*Red, White and Blue,*" and below them again, letter-press in French and English. The labels were affixed to the coffee-canisters sold by the firm.

In 1884 the firm obtained from Vice-Chancellor *Bacon* an interim injunction against a grocery company for an infringement of their registered trade-mark by the use in connection with coffee of a red, white and blue label; and on appeal, the injunction was upheld.

Upon the *Patents, Designs and Trade Marks Act*, 1883, coming into operation, the firm were advised that other traders might claim to register a "red, white and blue" trade-mark in connection with any of the goods comprised in Class 42 other than coffee, and accordingly they applied for the registration of a label in respect of the whole of the goods in that class. The label so sought to be registered was a coloured representation of the French tricolour, as before, having printed across it the words "'*Red, White and Blue*' label," with the name of the firm at the foot, but without the words "French Coffee." The Comptroller, however, refused to register the label as a trade-mark on the ground that it was not sufficiently distinctive.

Renshaw, Q.C., and *J. Cutler*, for the Applicants:—

This application is rendered necessary by the recent alteration in the law. Under the *Trade Marks Registration Act*, 1875, where a trade-mark was registered for particular goods in a class, a similar trade-mark could not be registered in the name of another proprietor for any goods in the same class without the leave of the Court; but this is altered by the *Patents, Designs and Trade Marks Act*, 1883, the requirement of the leave of the Court being now, by sect. 72, limited to cases in which the second application is in respect of the same goods or description of goods: *Sebastian* on Trade Marks (1). So that in our case the effect of the change is to entitle any person to apply for the registration of a red, white and blue label for any goods in Class 42 other than coffee. The Comptroller considered that our red, white and blue label was not sufficiently distinctive to entitle it to registration, but in

(1) 2nd Ed. pp. 306, 311.

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our action in 1884 the Court of Appeal held that our registered trade-mark of shaded stripes indicating colour was sufficiently distinctive to entitle us to an injunction. We submit we have a right under the Act to be protected against imitation.

Sir *R. Webster*, A.G., and *Ingle Joyce*, for the Comptroller:—

This is not a distinctive mark within the Act of 1883, because colour forms no part of a mark which is to be registered. The Applicants' action in 1884 related to a mark registered in 1881, and it was no doubt held to be a good mark under the old law then subsisting; but as to a mark not protected under the old law the applicant for registration must bring himself within the Act of 1883. By sect. 64 "a trade-mark must consist of or contain at least one of the following essential particulars . . . . (*c.*) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." Then sect. 67 says, "A trade-mark may be registered in any colour, and such registration shall (subject to the provisions of this Act) confer on the registered owner the exclusive right to use the same in that or any other colour." Taking the two sections together it is clear that the distinctive device or label must be one that is distinctive irrespective of colour, because, if the distinction vanishes when colours are used—for under the latter section any colour may be used at any time—the device or label ceases to be distinctive.

[KAY, J.:—Why should not a man register three parallel stripes of colour as a distinctive device?]

That would not be distinctive, for such a registration would give him practically, under sect. 67, the monopoly of every parti-coloured label. The device must be something that can be identified irrespective of the colour in which it is printed. Here, apart from the colour, all that would be printed on the register would be a label divided into three colourless stripes, which would of themselves afford no indication to the public of what was protected. It would be "calculated to deceive:" sect. 73. As regards the use of the red, white and blue label, Messrs. *Hanson* already get protection from the common law against imitation.

Their case is that their present trade-mark is identified with their coffee only: it is therefore not a distinctive device in connection with any other goods in Class 42. This is, therefore, so far as those goods are concerned, an application for the registration of a new mark, and we submit that the Applicants are not entitled to so large a use of their new mark as would amount to the exclusive use of every possible colour.

Renshaw, in reply:—

Now that colour may be registered, when you have a combination of colours it becomes a distinctive device. We should always be obliged to keep up three colours, though I admit those colours might be of any kind. We could only use a mark with three colours, though not necessarily red, white and blue.

KAY, J.:—

I am of opinion that the Comptroller is quite right.

When examined the case comes to a very simple point indeed. Before the Act of 1883 a device could not be registered in colours. The Applicants had an old trade-mark for coffee, and under the former Act they registered that as an old mark for that article. They were obliged to register it without any colour; so they put it on the register with the three parallel and seemingly equal stripes, the two outer ones shaded and the middle one white, and across they printed "*Red, White and Blue.*" That they were allowed to do because it was an old mark; but colour could not then be registered at all. Now it may be that they are in this position. They have had that mark and practically used it in the colours red, white and blue. It has been proved to me what their user was at the time of an action brought by them in 1884 with respect to the trade-mark so registered. Having used it in that way, it may very well be that no one else could use a label resembling that to the eye in connection with any article of food whatever in Class 42. Very likely, if that were done, it would be said, "you are trying to get the public to believe that the goods which you sell are goods which are either manufactured or selected by this firm of Sir *Reginald Hanson & Co.*" That is quite possible. The Applicants now

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come under the Act of 1883, and they say, "We are somewhat afraid that we might not have the power of preventing other people using this mark, which we have used so long, for such substances as cocoa and other articles which come within the class of which coffee is an item, and therefore we ask now to have this mark registered for all such other articles, in fact for all articles within the class of which coffee is an item."

I have, then, to consider whether--this not being an old mark with reference to these articles, but being, with reference to these articles, a new mark—the Applicants could possibly be allowed to register it under the Act of 1883 as a new mark. That puts out of sight entirely the fact of its having been registered for coffee before, and I must treat it as though this were a new application for registration under the Act of 1883 of a mark which had not been used before.

What is the objection? It is a very simple one. The objection is, "Your mark, independent of colour, is not distinctive; and under this Act of 1883 colour is treated as an accident."

This is the argument as I understand it. It is the plain intention of the Act that, where the distinction of the mark depends upon colour, that will not do. You may register a mark, which is otherwise distinctive, in colour, and that gives you the right to use it in any colour you like, but you cannot register a mark of which the only distinction is the use of a colour, because practically, under the terms of the Act, that would give you a monopoly of all the colours of the rainbow.

Now let us see whether that is so under the Act of 1883. Sect. 64 contains words that have been commented on very much, criticised very much, and of which we have had various expositions. The words which apply to this case are, "For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars . . . (*c.*) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use." Here, therefore, I must look for a distinctive device, mark, brand, heading, label, or ticket.

I have before me the thing which it is proposed to register. It consists of, as I have said, three parallel stripes, of apparently about the same width, and there is no division between them

at all. There is no line drawn between them. There is nothing on the paper to divide those three from one another except the colours in which they are printed. One is red, the middle one is white and the other is blue, and across them is printed "*Red, White and Blue.*"

To see whether the argument addressed to me on behalf of the Comptroller is right, I must look at the 67th section. Up to the time of the passing of the Act colours could not be registered. What says the Act? "A trade-mark may be registered in any colour:" but then, under the 64th section, the mark must be a distinctive device—must be something independent of colour: and then the section proceeds, "and such registration shall (subject to the provisions of this Act) confer on the registered owner"—what? "the exclusive right to use the same in that or any other colour." It is obvious that colour is, as I have said, treated as an accident, and that the distinctive device must be something which is distinctive independently of the colour. A difficulty arises in an instant if I allow this mark to go on the register as a new mark, which is what is now asked; for, to-morrow, or the day after, or at any time, the colours might be altered to any colour; I see nothing whatever to prevent Sir *Reginald Hanson* immediately obliterating the blue and red, and using white for all three stripes, in which case there would be no division, nothing at all on this mark in any way distinctive. Or, again, if that is thought an extreme instance, he might at any rate use them all in the colour red, or all in the colour blue, or one of them red and the two others yellow; or one of them red and the other two white, or one of them blue, and the other two green. He would be at liberty to use them in any colour he liked after having registered them in one; so that it seems to me that the point raised in this case against Sir *Reginald Hanson* is a very sound one.

The meaning of the Act I understand to be, that you may register a mark in a colour, but the mark must be a distinctive device independently of the colour. In this case there would be no distinctive device independently of the colour. If Sir *Reginald Hanson* registered it in one colour, or two or three colours, or half-a-dozen colours, he might afterwards use it in any colour or

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colours he pleased. Accordingly it seems to me the Comptroller is quite right, and that the application must be refused with costs.

An application was also made to proceed with the registration of the words "*Red, White and Blue*," as "fancy words not in common use" within the meaning of sect. 64, but in the course of the argument that application was abandoned, his Lordship holding that they were not words capable of registration.

That application was, therefore, also refused with costs.

Solicitors: *Ranger & Burton*; *Solicitor to the Board of Trade.*

G. I. F. C.

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HASLAM FOUNDRY AND ENGINEERING COMPANY *v.* GOODFELLOW.

[1887 H. 1198.]

Patent—Specification—Infringement—Action—Disclaimer—Motion for leave—Costs—Form of Order—Patents, Designs, and Trade-Marks Act, 1883, *s.* 19.

In a patent action for infringement, after all the pleadings had been delivered so that nothing remained to be done but to prepare the evidence for trial, the Plaintiffs asked, under sect. 19 of the *Patents, Designs, and Trade-Marks Act*, 1883, for liberty to apply for leave to disclaim one of the claims of their specification.

The application was granted on the following terms:—

The Plaintiffs to pay in any event the costs of the application, and the costs of action up to and occasioned by the disclaimer, except only so far as the proceedings in the action might be utilized for the purposes of the amended action. The Plaintiffs and the Defendants to be allowed to make all necessary amendments in their pleadings after disclaimer. The Plaintiffs to undertake forthwith to amend their pleadings, confining the action to the specification as amended by the disclaimer, or to consent to the action being dismissed with costs. In the event of trial all other questions of costs reserved.

Fusee Vesta Company v. *Bryant & May* (1) distinguished.

IN December, 1886, the Plaintiffs in the present action commenced an action in the Queen's Bench Division against Messrs. *Hall & Co.*, to restrain the alleged infringement of a patent for

(1) 34 Ch. D. 458.

improvements in refrigerative processes and apparatus for preserving meat and other articles of food. The specification comprised three separate claims.

At the trial of that action Mr. Justice *Stephen*, in delivering his judgment upon the issues of fact upon the 12th of November, 1887, held that the Plaintiffs' specification was good, with the exception of the second claim, which he held to be invalid; the effect of which decision was, *primâ facie*, to invalidate the whole patent.

Before that action came on for trial the present action was, in March last, commenced in the Chancery Division, for an alleged infringement of the same patent by the Defendants, *Goodfellow* and others. The statements of claim and defence, and the reply, in the Chancery action, were delivered before the judgment in the action against Messrs. *Hall*, and by the reply, which was delivered the day prior to the judgment, the Plaintiffs abandoned the charge of infringement of the second claim, but maintained that the Defendants had infringed the third claim.

The Plaintiffs now moved in the Chancery action, under sect. 19 of the *Patents, Designs, and Trade-Marks Act*, 1883, that they might be at liberty to apply at the *Patent Office* for leave to amend their specification by striking out the second claim thereof, and by making such other alterations (if any) as would be rendered necessary thereby, upon the terms of the Plaintiffs paying the Defendants all costs incurred in the Chancery action in relation to the matters proposed to be so struck out, or upon such other terms as the Court might think fit to impose, and that, pending such application or further order, all further proceedings in that action might be stayed.

In an affidavit in support of the motion the Plaintiffs' solicitor stated his belief that all the objections to the validity of the patent which had been put in by the Defendants, with a few exceptions which he specifically referred to, related to the third claim; for which reason he presumed they would be relied on by the Defendants even if the second claim were struck out.

Sir *R. Webster*, A.G., *Aston*, Q.C., and *Carpmael*, for the Plaintiffs:—

There is no opposition to the motion so far as it asks leave to

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apply for a disclaimer. The only question is on what terms as to costs such leave should be given. We do not deny that, according to your Lordships' decision in *Fusee Vesta Company* v. *Bryant & May* (1) (2), we ought to pay the Defendants' costs up to and occasioned by the disclaimer of the second claim of the specification. Those costs we are willing to pay, but we submit that the rest of the costs should be reserved to be dealt with at the trial, for they relate to other claims of the specification not affected by the present application, and as to which we may ultimately be successful. All the pleadings and proceedings in the action up to the present, other than those relating to the second claim, may still be utilized by the Defendants as well as by ourselves, and therefore we ought not, on this application, to be ordered to pay the costs of them. The Court has an absolute discretion, under sect. 19, to deal with the question of the terms, "as to costs and otherwise," upon which it may think fit to grant an application under the section: *Allen* v. *Doulton & Co.* (3)

Moulton, Q.C., and *Bousfield*, for the Defendants:—

We submit that the terms of the order made in *Fusee Vesta Company* v. *Bryant & May* should be adopted in the present case, and that we should have, in any event, the whole of our costs of the action up to and occasioned by the disclaimer, and not merely those occasioned by the disclaimer of the second claim. On their own admission the Plaintiffs cannot sustain the patent on which they have founded this action. As a check to plaintiffs bringing

(1) 34 Ch. D. 458.

(2) This case was again mentioned to Mr. Justice *Kay* on a day subsequent to that on which he delivered judgment in it as reported, and the order was ultimately settled in the following form:—

"Upon motion, &c., and upon reading, &c., And the Plaintiffs by their counsel undertaking to apply at the *Patent Office* for leave to amend the specification of their Patent No. 1965 of the year 1885, by way of disclaimer of the first claiming clause thereof, and by making such other alterations as will be rendered necessary thereby: This Court doth order that the Plaintiffs be at liberty to make such application accordingly. And it is ordered that, pending such amendment, all further proceedings in this action be stayed. And it is ordered that the costs of the Defendants, *Bryant & May, Limited*, of this action, up to and including this application and consequent upon the said amendment, be borne by the said Plaintiffs, the *Fusee Vesta Company, Limited*, in any event."

(3) 4 Rep. Pat. Cas. 377.

groundless patent actions, and then, after their pleadings have been put in, taking advantage of work done by the defendants to patch up their patent, it would seem desirable that, if they apply to the Court for the indulgence of being allowed to amend their specification by disclaimer, they should only be allowed to do so on the terms of their paying the whole of the costs of the action up to and occasioned by the disclaimer.

Sir *R. Webster*, in reply:—

As Mr. Justice *Stephen* has held the patent to be good with the exception of the second claim, which we are now willing to drop, it seems right to reserve till the trial all the costs of this action except those relating to the second claim.

KAY, J.:—

This case differs from *Fusee Vesta Company* v. *Bryant & May* (1) in this respect—that in that case very little had been done in the action beyond the writ, and accordingly I gave the defendants all their costs. But here I am told that the pleadings are completed, and that nothing remains but to prepare the evidence and bring the action on for trial. Since this action was began there has been a trial, against I suppose another alleged infringer, before Mr. Justice *Stephen*, and he has decided that this patent, as to one of its claims, is bad. Of course that makes the patent bad altogether; and, if that decision is acquiesced in and is not reversed, this action, when it comes on for trial, must fail.

The question is, what is right to be done on this application which is now made to the Court for leave to disclaim that part of the patent which Mr. Justice *Stephen* has declared to be bad—what ought to be allowed, and on what terms ought the leave to be granted? In the *Fusee Vesta Company's Case*, there having been very little done in the action, I thought that one of the terms should be that all the costs up to and occasioned by the disclaimer should be paid by the plaintiffs; but I did not wish to put them to the necessity and expense of issuing a new writ and commencing a new action, and therefore I allowed them, upon those terms and upon certain other terms, to amend, so

(1) 34 Ch. D. 458.

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that they might use the very few proceedings that had been taken in that action if they chose to continue it on the patent as amended by the disclaimer.

In this case I have to see what are the proper terms to be imposed where a good deal has been done as I have pointed out,—all the pleadings having in fact been completed. I think it would be quite right that the Plaintiffs should eventually pay all the costs of the action up to and occasioned by the disclaimer, except only so far as the proceedings in the action may be utilized for the purpose of the trial upon the leave to amend which I propose to give. What I mean is this. Supposing leave is given—as I propose to give it, and I understand it is not objected to—to the Plaintiffs to apply to amend by disclaimer, and then the action goes to trial upon the amended record, it may be that the Plaintiffs on that amended record will succeed. Then they will use, and the Defendants will also have the advantage of using, all these pleadings for the purpose of the action as altered. Then, so far as these pleadings are proper for the amended case, the Plaintiffs ought to get the costs of these pleadings. So far as they are not useful, of course the Plaintiffs ought to pay the costs of them. The effect of that will be, if the proper distinction is made, that instead of putting both parties to the expense of a new writ, a new statement of claim, a new defence, and a new reply, I shall enable both of them to use, for the purpose of the action that will have to be tried, the pleadings which have now been put in, subject to any amendment that it may be thought proper to make.

Therefore, what I propose to do is to give the Plaintiffs leave to amend their writ and statement of claim, and, if necessary, the reply, after they have put in the disclaimer: also to give leave, of course, to the Defendants to amend their defence, if necessary; and then, that being done, I think I must impose this further term, that the Plaintiffs must undertake forthwith, if they mean to go on with this action, to amend the action by stating the disclaimer and founding the action simply upon the specification as amended: or, if that is not done, they must dismiss the action and pay the costs of it.

Subject to that, I think the right order will be to reserve the

costs in order that the Judge who tries the action may deal with the costs of it altogether, according to the result; and if I have to try the action I shall certainly not forget the intimation I have now made as to the principle on which those costs ought to be dealt with.

The order was taken in the following form:

Application granted. The Plaintiffs to pay in any event the costs of the application and the costs of action up to and occasioned by the disclaimer, except only so far as the proceedings in the action may be utilized for the purpose of the trial under the leave to amend hereby given. The Plaintiffs and the Defendants to be allowed to make all necessary amendments in their pleadings after disclaimer. The Plaintiffs to undertake forthwith to amend their pleadings, confining the action to the specification as amended by the disclaimer, or to consent to the action being dismissed with costs. In the event of trial all other questions of costs reserved.

Solicitors: *Wilson, Bristows, & Carpmael*; *Sharpe, Parkers & Co.*

G. I. F. C.

Distinguished. In re SANDBACH [1951] 1 Ch. 294

Explained. Re SANDBACH (*decd.*). [1951] 1 All E.R. 971.

In re LORD SUDELEY'S SETTLED ESTATES.

[1887 S. 4710.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22, 25, 28, 33—*Settled Land Acts* (*Amendment*) *Act*, 1887 (50 & 51 *Vict. c.* 30), *ss.* 1, 2—*Land Drainage Charge—Application of Capital Moneys in Payment of Instalments.*

Where settled land is subject to a charge for land drainage improvements, repayable by instalments, money in the hands of the trustees of the settlement which is applicable as capital money arising under the *Settled Land Act*, 1882, may now, under the provisions of the *Settled Land Acts* (*Amendment*) *Act*, 1887, be from time to time applied in payment of such portions of the instalments as represent capital, so as to relieve the tenant for life from the payment thereof, but such money ought not to be applied in payment of such portions of the instalments as represent interest.

ADJOURNED SUMMONS.

The Applicant, Baron *Sudeley*, was entitled under the will of the late Baron, dated the 17th of June, 1862, to an estate for life in lands thereby settled and known as the *Toddington* estate in the county of *Gloucester*.

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By an order of the Inclosure Commissioners, dated the 15th of May, 1879, made in pursuance of the *Lands Improvement Company's Acts*, the settled lands were charged with a yearly rent-charge of £176 13*s.*, for a term of twenty-five years by way of repayment, with interest, of a sum of £2704 advanced for the purposes of drainage improvement. The rent-charge was payable half-yearly, and by a table annexed to the order the half-yearly payments were apportioned between capital and interest in sums increasing from half-year to half-year as regarded capital, and proportionately decreasing as regarded interest. The sums representing capital were stated in a column headed "Proportionate Repayment of the Loan."

Under the provisions of the *Improvement of Land Act*, 1864 (27 & 28 Vict. c. 114), the Applicant, as between himself and the remainderman, was bound, during the continuance of his interest, to pay the periodical instalments of the rent-charge.

The trustees of the will had in their hands money which, under the will, was liable to be laid out in the purchase of land, and which, therefore, under sect. 33 of the *Settled Land Act*, 1882, was applicable as capital money arising under that Act, and might under sects. 21 and 25 be laid out in payment for drainage works.

This summons asked that it might be declared that any money then or thereafter in the hands of the trustees for the time being of the settlement created by the will (being capital money or money applicable as capital money arising under the *Settled Land Act*, 1882) might properly be from time to time applied by the trustees in payment of the several instalments or sums specified and thenceforth payable under the head of "Proportionate Repayments of the Loan," in the table above-mentioned, and that the trustees might be directed to pay the said instalments or sums accordingly.

The trustees of the will were served with the summons. The remainderman, who was an infant, was not served.

By the *Settled Land Acts (Amendment) Act*, 1887, sect. 1, "where any improvement of a kind authorized by the Act of 1882 (*i.e.*, the *Settled Land Act*, 1882) has been or may be made either before or after the passing of this Act, and a rent-charge, whether

temporary or perpetual, has been or may be created in pursuance of any Act of Parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent-charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882."

By sect. 2, "any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of sect. 28 of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement."

Haldane, for the summons:—

It is not proposed to redeem the rent-charge, but only to pay the instalments representing capital, and this is "otherwise providing for the payment" of the rent-charge within sect. 1 of the Act of 1887.

[KAY, J.:—Are you not seeking to pay out of capital a charge which was advisedly and deliberately thrown on the tenant for life?]

That is the effect of the recent Act, which was passed to obviate the consequences of the decision in *In re Knatchbull's Settled Estate* (1), and to enable such an application of capital money as is now proposed to be made. Drainage is one of the improvements in which under sects. 21 and 25 of the *Settled Land Act*, 1882, capital money may be applied.

The summons only extends to the payment of instalments representing capital, but the Applicant is desirous, if the Court can see its way so to direct, that the whole of the instalments, interest as well as capital, should be paid. By sect. 2 of the Act of 1887, any improvement in payment for which capital money is applied under sect. 1 is to be deemed to be an improvement within sect. 28 of the Act of 1882, which provides that the tenant

(1) 27 Ch. D. 349; 29 Ch. D. 588.

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for life shall maintain and repair at his own expense every improvement executed under the provisions of that Act.

[KAY, J.:—That is impossible with drainage improvements; in process of time the work has to be re-done.]

Shelbeare, for the trustees:—

If the application is confined to payment of the instalments of capital the trustees raise no objection, as the interest of the remainderman does not seem to be affected.

[In answer to his Lordship he stated that the trustees were satisfied that the £2704 was expended in improvements coming within the meaning of the *Settled Land Act*, 1882.]

KAY, J.:—

I think that this application may be granted, assuming, of course, that the improvement which has been made is such as would come within the *Settled Land Act*, 1882; and the trustees inform me that they are satisfied that such is the case. That being so, I think that the words of the Act of 1887 are sufficient to justify the trustees in applying capital money in their hands, or which may come into their hands, in paying such portions of the instalments remaining to be paid as from time to time represent capital. But I do not think it would be right that they should pay such portions of the instalments as represent interest. I do not think that the Act of 1887 was intended, nor that it would be just, to relieve the tenant for life from his liability in that respect. It is going rather far to relieve a tenant for life from yearly payments of a rent-charge which represents capital money expended in such an improvement as drainage, because every one who is familiar with land in *England* knows that in most cases, if not in every case, such improvements after a time have to be done over again. However, that point appears to be completely covered by the fact that drainage is one of those things which by the terms of the *Settled Land Act*, 1882, are described to be improvements in payment for which capital money arising under that Act may be applied. On considering the point I think that the remainderman is not injured by the payment from time to

time of the instalments of these capital moneys, which as I understand have been expended in drainage, any more than by the *Settled Land Act*, 1882, he was intended to be injured (if it be an injury), by the application of capital money arising under that Act in payment for drainage improvements. The order will, therefore, be in terms of the summons.

Solicitors: *Young, Jackson, & Beard.*

C. C. M. D.

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1887
Oct. 27, 28.

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[1885 B. 5880.]

NORCLIFFE'S CLAIM.

Lease—Executor—Measure of Liability.

An executor who takes possession of a leasehold of his testator is liable personally as assign of the lease for subsequent rent, up to the letting value of the holding.

THIS was an action for the administration of the estate of a testator, *John Bowes*, who died on the 9th of October, 1885. It was uncertain whether the estate was solvent.

By a deed dated the 19th of April, 1872, *Rosamond Norcliffe*, as tenant for life of leasehold estate, demised to the testator, as under-lessee, a piece of land, part of *Langton Wold, Yorkshire*, then occupied by him as a training-ground for horses, for a year from the 6th of April, 1872, and thenceforth from year to year until the demise should be determined as therein provided. *Rosamond Norcliffe* died in August, 1881, and the Applicant, the Rev. *Charles Best Norcliffe*, thereupon became entitled as tenant for life in possession to the rents and profits of the land demised to the testator.

The testator used the land so demised to him down to his death for a training-ground. He received payments for agistment and for the privilege of training horses on it which he allowed to other persons.

The tenancy was determined on the 6th of April, 1887, by notice previously given by the executors of the testator under the lease as modified by a subsequent agreement. After the death of the testator his executors took possession of the land and received various payments in respect of pasturage and rent from horse-trainers, both under agreements made with the testator and fresh agreements.

Edward Young Western was now the sole executor.

This was a summons in the administration action:

"That an account may be taken of the rent now due to the said *Charles Best Norcliffe* under a certain indenture of lease dated the 19th of April, 1872, and made between *Rosamond Norcliffe*, of the one part, and the said *John Bowes*, of the other part, from the death of the said *John Bowes* to the 6th of April, 1887, when the said lease expired, in respect of 260 acres of land forming part of *Langton Wold*, in the county of *York*.

"That an account may be taken of the rents and profits received, or which but for the neglect or wilful default of the above-named Defendant, *Edward Young Western*, the surviving executor of the will of the said *John Bowes*, deceased, might have been or ought to be received by him or his agents in respect of the land comprised in the said lease since the 9th of October, 1885, the date of the death of the said *John Bowes*, to the 6th of April, 1887.

"That the said Defendant, *Edward Young Western*, may be ordered to pay to the Applicant the amount found due to the Applicant on the account first above mentioned out of the moneys with which the said Defendant is chargeable on the account secondly above mentioned, and to pay to the Applicant his costs of this application."

Napier Higgins, Q.C., and *W. C. Druce*, for the summons:—

The lessor has a personal right of action against an executor who has taken possession for the rent provided the rent is not more than the value or profit capable of being got out of the demised premises: *Hargrave's Case* (1); *Buckley* v. *Pirk* (2); *Rubery* v. *Stevens* (3); *Hornidge* v. *Wilson* (4); *Platt* on Leases (5). The common law right is clear; it is one with which the Court of Equity has never interfered. There is no objection raised to the jurisdiction in this action, and it will be convenient and advantageous to the executor and the persons interested in the estate no less than to the Applicant that the question be decided by the cheap and expeditious process of a summons instead of putting the Applicant to bring a new action.

(1) 5 Rep. 31 b.
(2) 1 Salk. 316.
(3) 4 B. & Ad. 241.
(4) 11 Ad. & E. 645.
(5) Vol. ii. p. 369.

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Cozens-Hardy, Q.C., and *Deane*, for the Executor:—

If it can be done the executor is willing to have the question tried on this summons. The proper remedy of the landlord is to prove in the administration against the estate and receive his dividend as a creditor; the right of action sought to be enforced against the executor is one that never has been recognised by Courts of Equity. An action against the executor for the rent is one, like other actions against the executor, which will be restrained pending administration. No such right could be set up in bankruptcy; this is a matter in respect of which the bankruptcy rules are, by virtue of the *Judicature Act*, 1875, s. 10, to apply.

Napier Higgins, in reply:—

The 10th section of the *Judicature Act*, 1875, has no application. The effect of that section is not to make an alteration that may enlarge the assets: *In re Count D'Epineuil* (1).

1887. Oct. 28. NORTH, J.:—

In this case Mr. *Norcliffe*, the Applicant, is the assign of a lady, who, on the 19th of April, 1872, let a large piece of land on *Langton Wold* to one Mr. *John Bowes*, the testator in the action, on an underlease from year to year, and the term actually expired on the 6th of April, 1887. In the meantime Mr. *Bowes* had died on the 9th of October, 1885. The rents were payable half-yearly on the 11th of April and the 11th of October, so that practically it was at the end of a half-year that Mr. *Bowes* died. At the end of the tenancy in April, 1887, four half-years' rent remained unpaid, one half-year practically being rent due in the lifetime of Mr. *Bowes*, the other three half-years being rent which had accrued after his death. Mr. *Western*, against whom the present claim is made, was one of the executors, and is now sole surviving executor of Mr. *Bowes*, and the question is what the legal right of the lessor against the lessee and against the executor in respect of rent was. I should add that Mr. *Western* immediately after the testator's death took possession of the property: he did not occupy himself, but he let portions of it, and he received the rent that was payable from various persons

(1) 20 Ch. D. 217.

to whom, in his lifetime, Mr. *Bowes* had allowed the use of it, for training and other purposes.

Now the right of the lessor, the claimant, as against the lessee of the estate, is perfectly clear. He has a right to come in and prove for the whole of the rent; but proving for the rent he can only be entitled to receive, if the estate is insolvent, as is possible in this case, the same dividend that other creditors would be entitled to receive in respect of it. Then what is his position as against the executor who has, in the way I have mentioned, entered into possession? Of course if, sued as executor, he puts in a proper plea, he is only liable to the extent of the assets; but it is also open to the lessor to take proceedings against him as assign of the lease, and if he does that he is entitled to recover the rent from the executor as assign of the lease. But a hardship may be inflicted upon the executor if he finds himself in possession of property for which he has to pay the full rent, and the property itself is not worth as much as the rent. Therefore, the law is, as the cases cited and several others clearly establish, that if an executor is sued as assign of the lease for the rent accrued during the time in which he was in possession, he is entitled to set up by way of defence that he is only assign as executor, and that the profits or yearly value (I will consider the meaning of those words presently) of the property amount only to a sum less than the rent. Then he must pay into Court the amount that he admits to be the value, and if his plea is proved, and that is the full value, he will be under no further liability in respect of the matter. I used the words "profits or yearly value." In some cases that have been referred to the Court has spoken of the liability of the executor in respect of profits; and it has been said at the bar that profits mean merely what he actually has received minus the expenses, and therefore the profits cannot include anything which has not been received, and which therefore cannot be profit. But in the cases in which the word "profit" was used the Court generally assumed the profits to be more than the rent, in which case it did not matter whether they were called "profits" or anything else. Even in the few cases where the profits were referred to as being less than the rent, no suggestion was made that less than the full profits,

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whatever they were, had actually been received. It seems to me that the word "profits" does not accurately describe that for which the executor, as assign, is liable. What he is liable for is to account for what the actual value of the premises to him has been during the time in which the rent for which he is sought to be made liable has accrued, or the time in which he has been in possession. In the case of an executor who has proved the will it would be from the time of the testator's death. That is independently of any question whether that value has actually been received by the executor or not. That seems to me to be quite clear.

In the first place I refer to the form of plea as given in *Woodfall's* Landlord and Tenant (1), and there it says that an executor "sued as an assignee of the term, and who has not assigned over, may plead—except as to £ —— (being the full actual value of the demised premises during the period in respect of which the rent is claimed, and which should be paid into Court, or the claim for it be otherwise answered)—that the term did not vest in him by assignment otherwise than as executor or administrator, and that he has not at any time since the death of the lessee received or derived, nor could he during any part of that time receive or derive, any profit from the said demised premises, except sums amounting to the sum excepted, and that the said demised premises have not since the death of the lessee yielded any profit whatever, except to the amount excepted." Then the plea goes on to deal with the surplus with respect to which his liability depended upon whether he had assets or not. That is the form of plea given. In the case of *Hornidge* v. *Wilson* (2), Lord *Denman* says, "With respect to the value, it is clear that an administrator who has fully administered and is chargeable with no default or laches, may discharge himself from liabilities to a greater extent than the real value; but we think that the real value, as against one who takes to the premises and accepts rent for them after the death of his intestate, must be taken to be that which the premises would have been worth but for his own act," that is to say, the question what he has received is not the test, but the real

(1) 11th Ed. 263. (2) 11 Ad. & E. 655.

value of the premises. In that case an executor as assign was held liable for what might have been received if he had kept a covenant to repair, which he had not done, and also he was held liable for rent which a tenant was bound to pay, but being insolvent had failed to pay. Therefore, as to both those sums the executor was held liable in respect of money which he had not received, and as to one of which he could not actually have received through the insolvency of the tenant. That states the principle very clearly. But there is another later case, the facts of which come very near to the present, and that is *Hopwood* v. *Whaley* (1). The marginal note is this: "Executor of lessee for years, is, in the absence of other assets, liable, *de bonis propriis*, for the rent reserved, to the extent to which he might, by the exercise of reasonable diligence, have derived profit from the premises." Now in that case the property was held for three years under a lease after the death of the testator: the rent payable to the lessor was £90 a year, and £270 the amount of rent claimed. For one quarter the executor himself was in actual occupation, and his liability therefore to pay one fourth of the rent, or £22 10*s.*, was clear. During the remaining two and three-quarter years the property was unlet. He had tried to let it for a rent equivalent to the full rent payable, but had failed to do so, and the property had remained unlet. The questions left to the jury are stated thus (2): "The learned judge was of opinion, that, as there was no plea of payment, to cover the quarter during which the defendant occupied the premises, the plaintiff must, at all events, have a verdict for that; and he left it to the jury, to say, first, whether the defendant had, in fact, derived any profit or advantage from the premises, and, if so, to what amount; secondly," and this is the important point—"whether he might, by the exercise of reasonable diligence, have derived profit or advantage therefrom, and, if so, to what amount." Now the finding of the jury was that he had received the £22 10*s.*; and also that although the property could not be let for £90 a year, it might have been let for £60 a year; and the result was that the executor was held liable at the rate of £60 a year for the two years and three-quarters in which he had not himself occupied,

(1) 6 C. B. 744. (2) 6 C. B. 747.

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and for the full rent for the remaining quarter. After considering the form of plea, and commenting on the cases of *Hornidge* v. *Wilson* (1) and *Rubery* v. *Stevens* (2), Mr. Justice *Coltman* says (3): "The question, then, in substance, is, whether the defendant *might* have received profit and advantage from the premises to the amount of the rent due, or of any part thereof." Mr. Justice *Maule* puts the matter very clearly. He says (4): "The cases on the subject of a lease devolving on an executor, where the rent reserved exceeds the value of the premises, are involved in some difficulty. I think, however, upon the authorities, as well as on principle, that, where the rent reserved exceeds the value of the premises, an executor, in the character of assignee, is liable to the extent of such value; and, where the value exceeds the rent reserved, to the extent of such rent."

Now, those authorities clearly shew what the liability of the executor would be in the present case. He is liable for the actual value of the premises during the time in which he held the premises as assign, that is to say for a year and a-half after the testator's death.

Then the question of how the value is to be arrived at arises, and it is clear from those authorities that the value is to be arrived at, first, by considering what he has received, and in addition to that by considering what he might have got if reasonable diligence had been used. Therefore, there are those two items to be considered which make up the total amount, for the aggregate of which he is liable, provided always they do not together exceed the full amount of the rent.

Now, in the present case the application is made in an informal way—in a way which caused me a difficulty that I do not see my way to get over excepting by concession of the parties, although the Respondent to the application has not raised any technical objection to the form of the application. The application is by summons in the action to administer the estate of Mr. *Bowes*, and it asks, to put it shortly, that an account may be taken of what is due for rent since the death of *John Bowes* to the expiration of the lease, that an account may be taken of the rent and profits

(1) 11 Ad. & E. 645.
(2) 4 B. & Ad. 241.
(3) 6 C. B. 755.
(4) Ibid. 756.

received, or which, but for the wilful neglect or default of Mr. *Western*, might have been received in respect of the land during the same period; and then that Mr. *Western* may be ordered to pay the amount found due to the Applicant on the account first mentioned out of the money with which he is chargeable on the account secondly mentioned, and to pay the costs of the application. As regards the estate of the testator, that form of claim is entirely misconceived. The right of the landlord against the testator's estate is merely to prove for the whole rent, and be paid like any other creditor is paid. As against the executor he would have a right to bring his action and to recover such an amount as was found to be due substantially upon the footing of such accounts as are asked by the summons. But that is not the measure of the liability of the testator's estate. As I understand the summons has been presented in this form upon the footing that the executor has been acting properly in the administration of the estate, and that whatever he is liable for, the estate would be liable to recoup to him; and therefore the irregular step has been taken, with the acquiescence of all parties, of making the claim directly against the estate instead of against the executor personally. But, as I pointed out, the measure of liability of the estate is the whole rent and nothing else; and, assuming that the executor pays the full amount that is asked for by the claim, he would not have a right to stand as against the estate as creditor for that amount, because even assuming that he was entitled to recover from the estate such a sum as he had actually received and accounted for to the estate, still he clearly could not be entitled to receive from the estate what he had to pay by reason of his omission to recover what he might have done, because that is a loss that he would have to account for to the estate, and the estate would not be answerable for. If, therefore, I were simply to direct the inquiry in the form asked by the summons, it would not give me any measure by which to ascertain the liability of the testator's estate. Further than that there is this difficulty: at the present time the only parties who are here are Mr. *Norcliffe*, the applicant, on the one hand, and the executor on the other as representing the estate; and no question between the estate and him can be decided where he is the only person

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representing his own interest, and also representing the estate, which really has an adverse interest to him. It seems to me, therefore, upon this summons as it stands I cannot give any relief; and therefore as against the estate, but for what I am going to say, I should have to dismiss the summons, and I should dismiss the summons without costs; upon the ground that the application fails as regards the estate, but has been made in this form with the concurrence of the executor with a view to saving trouble and expense to all parties if it could be done. Strictly speaking all that I can do is to dismiss the summons.

But I have pointed out what in my opinion is the liability of the parties. The liability of Mr. *Western* can strictly only be enforced by an action brought against him to recover the sums for which he is liable, and upon the present summons in the matter of the estate I cannot make any order against him. Unless he consents to an amendment of the summons, it must simply be dismissed. But inasmuch as the matter has been argued fully, and I have expressed my opinion, it seems to me to be worth his while to consider whether it would not be better to amend the summons. I leave the words to counsel, but something to this effect—in addition to what is asked by it, adding an application that in the alternative, if the Court should be of opinion that the Applicant is not entitled to any of the relief asked against the estate, then Mr. *Western* might be ordered personally to pay what should be ascertained to be due on taking the account. That can only be done by consent. If that was done, and Mr. *Western* submitted, and it appeared on the face of the order that he submitted, to be bound by the decision on the summons in the same way as if a writ against him had been filed, the parties would be in the position of having got a judgment upon the point in question in the cheapest possible way in which a judgment could be got, and of course it would be open to him, if he was not satisfied with the view I have taken, to appeal from it. Unless the parties assent to that view being taken, all that I can do is to dismiss the summons and leave Mr. *Norcliffe* to take such remedy as he may be advised against Mr. *Western*. If the course I have suggested is assented to, I should give no costs either way, because although in that

case Mr. *Norcliffe* would have succeeded, yet he would only have succeeded by arrangement between the parties that a claim which was not right in form, might be put right so as to be made formal. It is for the parties, therefore, to say whether they will adopt the one course or the other. In the one case the summons will be dismissed without costs; in the other case what I should propose to do would be to make a declaration to the effect that Mr. *Western* is liable in the way I have suggested, and to direct an account of rent due during the time that he has been in possession; and also, on the other hand, an account in the form used in the direction to the jury in *Hopwood* v. *Whaley* (1), whether he had in fact derived any profit or advantage from the premises, and if so, what amount; and secondly, whether he might by the exercise of reasonable diligence have derived profit or advantage therefrom, and if so, to what amount.

There are two points that were argued by Mr. *Hardy*, about which I ought to say a word. The first was this. He says that no precedent can be found, and I am not aware of any myself, in which any such claim as this has been allowed in an administration suit. As the executor's liability is personal as assign and not as executor, I should not expect to find any such claim made in an administration suit, because it is a subject of an action at law, and there are numerous actions reported in the books in which such a claim has been made personally. It is quite true if he were sued and recovered against he might have some claim against the testator's estate. As all parties interested in the estate are now represented by the same counsel, I cannot consider what the extent of the liability would be, whether the executor would be entitled to stand in the place of the lessor as creditor of the estate, or whether he would be entitled to have back out of the estate in full the amount that he has received and paid into the estate. It may well be that questions of this sort, which do not appear in the books, have arisen in administration suits; and the fact that no reported case is found bearing upon it in equity does not seem to me really important.

The second observation made by Mr. *Hardy* was this. He said this application was irregular; if it were regular it would

(1) 6 C. B. 744.

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be by writ; there is a suit to administer Mr. *Bowes'* estate; if a writ had been issued against the executor that action would have been stayed at once, because the creditor already has the benefit of the decree for creditors generally, and would not be allowed to prosecute that action; and Mr. *Norcliffe* ought not to be in a better position upon an irregular application than he would have been if the application had been in regular form. But that argument seems to me to be based upon a mistake. If this claim were against him as executor there would be something to be said for it; in fact I think the argument would have been right; but as it is made against him as assign it is against him *de bonis propriis*, and it is impossible to say that an action would be stayed against the executor merely because there is a suit to administer the estate of which he is executor, when the ground of the action really is not his liability as executor but his personal liability. Suppose that in this case instead of the executor having become liable as assign the testator had been liable for the rent and Mr. *Western* had been surety for it. Of course if he had been surety for the payment of the rent, no suit to administer Mr. *Bowes'* estate would have prevented an action being commenced and prosecuted to the end against the surety to recover the rent from him. Therefore that being the real position of things, the executor being liable not as such, but as assign *de bonis propriis*, it is impossible to say that an action against him in that character could be stayed merely because there was a suit to administer the estate of which he happened to be executor.

Solicitors for Applicant: *Crossmans & Prichard*, agents for *Brown & Elmhirst, York.*

Solicitors for Executor: *Western & Sons.*

D. P.

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Dec. 3.

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[1869 D. 131.]

DE STACPOOLE *v.* STAPLETON.

[1876 D. 45.]

In re DE STACPOOLE. DE STACPOOLE *v.* SEYMOUR.

[1876 D. 51.]

Husband and Wife—Marriage of Female Ward of Court—Costs of Settlement—Order for Payment out of Corpus of Settled Property.

Ordered that the costs of a settlement of the property of a female ward of Court, made upon her marriage with the sanction of the Court, should be paid out of the *corpus* of the settled property.

Anonymous (1) followed.

PETITION by Mrs. *De Trafford*, the wife of *G. A. Cathcart De Trafford*, (by a next friend), and by the trustees of the settlement, dated the 18th of August, 1887, executed prior to her marriage, asking that, subject to the payment of costs, certain funds in Court in the above actions might be transferred to the trustees.

Mrs. *De Trafford* was at the time of her marriage on the 20th of August, 1877, and was still, an infant. She married with the sanction of the Court, and the settlement, which comprised only her property, including the funds in question, was made under the *Infants' Settlement Act* of 1855, with the approval of the Court.

By the settlement the first life interest was given to the wife, and the second life interest to the husband. The settlement did not contain any provision as to the payment of the costs of its preparation.

Cookson, Q.C., and *Dauney*, for the Petitioners.

R. F. Norton, for the husband:—

The conveyancing costs of the settlement ought to be included in the costs which are to be paid out of the funds in question.

(1) 4 Russ. 473.

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The practice that the costs of a marriage settlement of property either of the husband or the wife should be paid by the husband was founded on the old law that a husband was liable for the debts of his wife contracted before marriage: *Helps* v. *Clayton* (1); *Hayward* v. *Fiott* (2); *Davidson's* Conveyancing (3). In *Helps* v. *Clayton* only property of the husband was settled. But now, by virtue of sect. 14 of the *Married Women's Property Act*, 1882, a husband is liable for the debts of his wife contracted before marriage only to the extent of her property to which he has become entitled. Consequently, the reason for the old practice no longer exists. It is not unusual now to insert in a settlement a clause providing for the way in which the costs of its preparation are to be paid: *Wolstenholme's* Conveyancing Acts (4). At any rate, on the marriage of a female ward of Court it is in accordance with the practice to provide for the payment of the costs of a settlement of her property. In *Anonymous* (5) a man had married a ward of Court without the previous sanction of the Court, but he was not aware that she was a ward. He had no property. On a petition to confirm the Master's report approving of a settlement, Sir *J. Leach*, M.R., ordered that the costs of the husband should be paid out of the fund.

Dunning; and *J. W. Williamson*, Jun.; for other Respondents.

NORTH, J.:—

I think the *Anonymous case* cited from Russell comes sufficiently near the present case for me to act upon it. I will order that the costs of all parties of the settlement (including the costs of the husband) be paid out of the corpus of the funds which are to be transferred to the trustees.

Solicitors: *Street & Poynder; Mander & Watson; Minet, Harvie, & Smith.*

(1) 17 C. B. (N.S.) 553.
(2) 8 C. & P. 59.
(3) 3rd Ed., vol. iii., p. 728.
(4) 4th Ed., p. 331.
(5) 4 Russ. 473.

W. L. C.

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KINGDON *v.* KIRK.

[1887 K. 747.]

Vendor and Purchaser—Action for Specific Performance—Default in Completion—Declaration that Vendor entitled to forfeit Deposit—Non-appearance of Defendant—Costs.

In an action by a vendor for the specific performance of an agreement to purchase real estate, the purchaser having accepted the title, but having failed to complete at the time fixed, there being a condition empowering the vendor, in case of the failure of the purchaser to comply with any of the conditions of sale, to forfeit the deposit and resell the property :—

Held, that, in lieu of judgment for specific performance, a declaration may be made, even though the Defendant had not appeared to the writ, that the vendor was entitled to forfeit the deposit and resell the property, if the writ has claimed such a declaration in the alternative.

But *held*, that the order should direct Plaintiff to pay the costs of the action.

Stone v. *Smith* (1) distinguished.

ACTION by a vendor against a purchaser of real estate to enforce the specific performance of the agreement for purchase. The purchaser had paid a deposit. One of the conditions of sale empowered the vendor, in case the purchaser should fail to comply with any of the conditions, to forfeit the deposit, and to resell the property. The purchaser had accepted the title, but had failed to complete at the time fixed by the agreement for completion. The statement of claim claimed specific performance of the agreement, or, in the alternative, a declaration that the Plaintiff was entitled to forfeit the deposit, and to resell the property in accordance with the conditions. The Defendant had not appeared to the writ, and the statement of claim had been delivered by filing it, as provided by r. 12 of Order XIII. The action now came on for trial by motion for judgment.

Levett, for the Plaintiff :—

I ask for a declaration according to the second alternative of the statement of claim. The case is distinguishable from *Stone* v. *Smith*, in which Mr. Justice *Kekewich* refused to give similar

(1) 35 Ch. D. 188.

NORTH, J. 1887 KINGDON v. KIRK.

relief, because in that case the statement of claim had only asked for specific performance of the agreement.

The Defendant did not appear.

NORTH, J.:—

I will make the declaration, but the Plaintiff must pay the costs of the action. As the Defendant has not appeared, the result will be the same as if I made no order as to costs. But the declaration is in the nature of a luxury, for which the Plaintiff ought to pay, and it should appear on the face of the order that it is made on the terms of his doing so.

It was subsequently discovered that the writ had claimed only specific performance of the agreement.

NORTH, J.:—

As the Defendant has not appeared to the writ, the Plaintiff, as I decided in *Gee* v. *Bell* (1), following other cases, can have judgment only for what he has claimed by the writ, *i.e.*, the ordinary judgment for specific performance.

Solicitors: *Warren, Gardner, & Murton.*

(1) 35 Ch. D. 160.

W. L. C.

NORTH, J.
1887
Dec. 8.

In re GIBBES' SETTLEMENT. WHITE *v.* RANDOLF.

[1887 G. 1578.]

Will—Appointment—Revocation—Wills Acts (1 *Vict. c.* 26), *s.* 27 [*Revised Ed. Statutes, vol. viii., p.* 35].

A testator executed a "testamentary appointment" under a general power. A month later he executed a will containing a residuary bequest, and not referring to the testamentary appointment:—

Held, that the will operated as an execution of the power, and revocation of the testamentary appointment.

BY a settlement made on the marriage of the Rev. *Heneage Gibbes*, the testator in this matter, and Miss *Margaretta Murray*, in 1834, a sum of £1000 was settled upon trust after the death of the intended husband and wife "for such person or persons, and subject to such powers and privileges, and in such shares, manner, and form as he, the said *Heneage Gibbes*, at any time or times hereafter by his last will and testament in writing, or any codicil thereto, or any writing in the nature thereof, respectively to be signed and published by him in the presence of one or more credible witness or witnesses, shall direct or appoint, give or bequeath the same."

Margaretta Gibbes died in the lifetime of *Heneage Gibbes*. He died in March, 1887.

Heneage Gibbes on the 20th of June, 1883, duly executed a testamentary appointment in the following form: "This is the testamentary appointment of me, the Rev. *Heneage Gibbes*, Rector of *Bradstone*, in the county of *Devon*, M.B., made in pursuance of the power or authority given or reserved to me by the settlement made on my marriage, and dated the 27th day of October, 1834, and in pursuance and exercise of every other power or authority whatsoever, enabling me in this behalf, I direct, appoint, give, and bequeath the sum of £1000 over which I have a power of appointment by the said settlement, after payment of all my just debts, funeral and testamentary expenses, whether of this testamentary appointment or of my will or codicil affecting

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my general property, unto my four sons in equal shares and proportions, as tenants in common, and not as joint tenants. And I appoint *George Graham White*, of *Launceston*, in the county of *Cornwall*, Gentleman, executor of this testamentary appointment."

He also executed a will on the 20th of July, 1883, commencing: "This is the last will and testament of me, *Heneage Gibbes*, Rector of *Bradstone*, in the county of *Devon*." After bequests of specified articles of plate and furniture to his four sons and his three daughters, the will proceeded: "All the rest and residue remainder of my estate and effects whatsoever wheresoever, I give, devise, and bequeath unto all my children equally as tenants in common. I appoint *George Graham White*, of *Launceston*, in the county of *Cornwall*, Gentleman, executor of this my will."

The testator also executed a codicil, dated the same day as his will, in the following terms: "This is a codicil to my will. In case any creditor or assignee of my son *Heneage Gibbes*, or any other person claiming or being entitled to claim any property or affects given by my said will to my said son *Heneage*, over and above the some of £300 referred to in the testamentary appointment of my late wife in favour of my said sons, such property or effects I give unto my son *George Edward* absolutely."

George Graham White proved the testator's will and codicil of the 20th of July, 1883. He applied also at the same time for proof of the testamentary appointment of the 20th of June, 1883; but the registrar refused and the application was not brought before the Court.

This was an originating summons, to which *George Graham White* was Plaintiff, and *Edward Randolf* (the sole surviving trustee of the settlement) and two of the testator's sons were the Defendants. The summons asked for a declaration that the Plaintiff, as executor of the will of the testator, was entitled to the sum of £1000 mentioned in the settlement, and over which the testator had a general power of appointment conferred on him by the settlement.

It was in evidence that by reason of the conditional mode in which the late Mrs. *Gibbes* had appointed funds over which she

had a power under the marriage settlement, the interest of the beneficiaries would be the same whether the testamentary appointment by Mr. *Gibbes* did or did not take effect.

Cookson, Q.C., and *Vernon Smith*, for the executor:—

The *Wills Act*, sect. 27, provides that a residuary bequest is to be an exercise of a general power of appointment over personal estate unless a contrary intention appears in the will. No such intention appears in the will. There is no reference to the previous will or testamentary appointment; that is therefore revoked, and the executor is entitled to the £1000 under the last will.

J. Henderson, for the trustee of the settlement:—

If the executors had proved both documents, as they could have done by applying to the Judges of the Probate Division: *In the Goods of Fenwick* (1); this summons would have been unnecessary. The testamentary appointment and the last will were intended by the testator to be and are, together, one will, and the two together are to be looked at to see what the intention of the testator was: *Inglefield* v. *Coghlan* (2). A revocable appointment by deed is not revoked by a subsequent will which does not expressly revoke it: *Palmer* v. *Newell* (3); *Pomfret* v. *Perring* (4).

Cookson, in reply.

NORTH, J.:—

I have no doubt that what the testator meant was that by the instrument, dated the 20th of June, 1883, he should exercise the power of appointment, and that by the instrument dated the 20th of July he should dispose of his property not included in the appointment made a month before. I think the two instruments were intended to operate together. I am confirmed in that view by the terms of the codicil. I cannot believe that was intended to apply only to an instrument made on the same day.

But I feel very much as Mr. Justice *Kay* did when he pro-

(1) Law Rep. 1 P. & D. 319.
(2) 2 Coll. 247.
(3) 20 Beav. 32.
(4) 5 D. M. & G. 775.

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nounced judgment in the case of *In re Jones*. He there says (1): "I think that this case is covered by the Act. As I read the statute it is useless to speculate about the intention of the testatrix. The Court may have a strong suspicion that the testatrix did not intend to exercise what is called a general power of appointment, and that if she had been told that she had done so, she would have been very much surprised to hear it. But the statute renders any such speculation fruitless." The question is really as to the second instrument as it stands.

I think it is a pity that the application to allow proof of both instruments was not made to the Court of Probate, as this would have removed all question as against the trustee of the settlement. But for some reason or other the parties have not taken that course. The question is as to the strict legal rights under the will. That document, after some specific bequests, proceeds as follows: "All the rest, residue, and remainder of my estate and effects, whatsoever and wheresoever, I give, devise, and bequeath unto all my children equally." I should have thought that in itself was quite sufficient to explain the meaning without being driven to any other instrument, and meant "I give, devise, and bequeath everything I have not hereinbefore disposed of." And these words beyond question would be sufficient to operate as an execution of the general power if the testamentary appointment had never existed. But does the existence of the testamentary appointment not referred to in the will affect the matter? In my opinion it does not, because the statute itself shews what a contrary intention is, and the mode in which it is to be shewn. Sect. 27 says a general bequest is to operate as an execution of a general power over personal estate "unless a contrary intention shall appear by the will." Now in my opinion the will referred to there is the instrument in which the general bequest is contained, and therefore I cannot look beyond that document to find a contrary intention. The contrary intention must be found within the four corners of the document itself. I do not find it there. Of course I might look at any subsequent codicil. Under these circumstances I come to the conclusion that the will did operate as an execution of the

(1) 34 Ch. D. 65, 67.

power of appointment and revocation of the previous appointment, and that probate of the testamentary appointment need not be taken out.

The trustee will have costs as between solicitor and client.

Solicitor for executor: *G. H. Carthew.*

Solicitors for the trustee of the settlement: *Dawes & Sons.*

D. P.

STIRLING, J.

1887
Nov. 12, 19.

In re FREEMAN'S SETTLEMENT TRUSTS.

New Trustees—Appointment of, by Court—Two New Trustees out of, and one within, the Jurisdiction—Real Estate—Power of Sale—Remuneration of Acting Trustee in England.

The *cestuis que trust* (some of whom were infants) under a settlement of freehold farms in *Wales* (dated in 1840), were all resident out of the jurisdiction either in *Canada* or the *United States*. The settlement contained a power of sale exercisable with the consent of the equitable tenant for life, and a power of appointing new trustees exercisable by the surviving or continuing trustee, or the heirs or assigns of the last surviving or continuing trustee.

In 1874, when both the original trustees of the settlement were dead, the executrix of the last surviving trustee, erroneously believing herself empowered in that behalf, purported to appoint two persons resident in *Canada* to be trustees of the settlement. These two persons, believing themselves to be duly appointed, had acted as trustees since 1874, and had employed an English agent to receive the rents of the farms, paying him a commission for so doing. The heir of the last surviving trustee could not be found, and there was no one capable of exercising the power of appointing new trustees contained in the settlement.

Upon a petition by all the *cestuis que trust* for the appointment by the Court of the two Canadians and the English agent as new trustees, and for authority to pay the English trustee a commission on the rents while acting as manager and receiver, the Court appointed the two persons resident in *Canada* and the English agent to be new trustees of the settlement, but required an undertaking by the trustees out of the jurisdiction in case the power of appointing new trustees should become exercisable by them, or either of them, not to appoint any new trustee resident out of the jurisdiction without the consent of the Court.

The Court also, subject to the production of evidence as to the number of the holdings, the rents and dates of payment, the necessity of paying a commission for collecting the rents, and that the proposed remuneration was proper, sanctioned the payment of a commission to the English trustee.

PETITION.

By an indenture of settlement, dated the 10th of February, 1840, and made between *Joshua Freeman* and *Mary*, his wife, of the one part, and *John Bethel* and *S. B. Freeman* of the other part, certain real estate, consisting of seven freehold farms and three other small properties in *Wales*, with an aggregate acreage of about 700 acres, and a rental of about £385, were assured to the use of the said *John Bethel* and *S. B. Freeman* and their

heirs upon trust to pay the rents to *Mary Freeman* during her life for her separate use without power of anticipation, and after her death to *Joshua Freeman* during his life; and after the death of the survivor, to hold the trust premises upon trust for the children or child of *Mary Freeman* by *Joshua Freeman* or any other husband as she should appoint; and in default of and subject to any such appointment, upon trust for all and every the children and child of *Mary Freeman* by *Joshua Freeman* or any husband with whom she might intermarry after his death, sons at twenty-one and daughters at marriage or twenty-one, in equal shares as tenants in common. The settlement contained a power of sale exercisable by the trustees with the consent of the persons for the time being entitled to life interests under the settlement, and a power of appointing new trustees which was exercisable by the surviving or continuing trustee, or the heirs or assigns of the last surviving or continuing trustee.

John Bethel died in February, 1867. *S. B. Freeman* died on the 14th of April, 1874, having by his will appointed his wife *Catherine* his sole executrix, and she proved the will in *Canada* on the 24th of April, 1874. By indenture dated the 20th of November, 1874, to which *Joshua* and *Mary Freeman* were parties, *Catherine Freeman* purported to appoint *W. Duff* and *S. Lazier* to be trustees of the settlement of February, 1840, and also purported to convey the trust property to them in fee simple upon the subsisting trusts thereof. This indenture was executed by all parties under the erroneous supposition that *Catherine Freeman* was the person by whom the power to appoint new trustees was exercisable.

Joshua Freeman and *Mary*, his wife, were still alive, and there had been six children of the marriage, all of whom had attained twenty-one or married, and one of those children, a daughter, had married, and died leaving two infant children, who were her co-heiresses-at-law. The power of appointing amongst children contained in the settlement had never been exercised. *Joshua Freeman* and *Mary*, his wife, had been for some years before the date of the settlement, and still were, resident in *Canada*, and all the other persons interested under the settlement had been for some time, and were now, resident either in *Canada* or in the *United States*.

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Since the execution of the indenture of November, 1874, *W. Duff* and *S. Lazier* had been acting as trustees of the settlement, and the rents of the various farms and other properties had been received for them by Mr. *D. Lloyd*, a land agent in *Wales*, who acted there as agent in the management of the property and collection of the rents, and they had paid him a commission of £5 per cent. upon the amount of the rents for his time and trouble in so doing.

In October, 1885, Mr. *Lloyd* made an application under a power of attorney from Messrs. *Duff* and *Lazier* for the payment out of Court of a sum of money paid into Court by a railway company in respect of a small part of the settled property which had been taken by the company, and this application was dismissed on the 27th of November, 1885, by Mr. Justice *Kay*, upon the ground that *Catherine Freeman* had no power to appoint new trustees of the settlement, and that the appointment of the 20th of November was invalid.

The mistake made in 1874 was thus discovered, and as the heir-at-law of *S. B. Freeman* could not be found, this petition was presented by all the persons beneficially interested under the settlement, and also by *W. Duff* and *S. Lazier*. The petition prayed that *W. Duff*, *S. Lazier*, and *D. Lloyd* might be appointed trustees of the settlement in the place of *Bethel* and *Freeman*, and that they might be authorized to pay to *D. Lloyd*, so long as he managed and superintended, and collected the rents of the property, a commission of £5 per cent. upon the amount of the rents received by him; and it also prayed for the usual vesting order as to real estate and *choses in action*.

The beneficiaries knew no one in *England* whom they could ask to be a trustee, except Mr. *Lloyd*; and he would not become a trustee except on the terms of his continuing to receive the same commission as had previously been paid to him. All the beneficiaries who were *sui juris* were willing that such commission should continue to be paid, notwithstanding the appointment of Mr. *Lloyd* as a trustee.

Farwell, in support of the petition:—

No doubt new trustees, whether they are to be appointed under a power or by the Court, must as a general rule be persons within

the jurisdiction, and the Court has refused to appoint persons resident out of the jurisdiction upon the ground that they might transfer the fund abroad, so that it might become subject to foreign instead of English law: *In re Guibert* (1).

But the rule has often been relaxed in special cases, and where the *cestuis que trust* have been resident in a country out of the jurisdiction the Court has not only held that an appointment of persons resident in that country, although not expressly authorized by the settlement, was justifiable and valid: *Meinertzhagen* v. *Davis* (2); *Re Smith's Trusts* (3); *In re Cunard's Trusts* (4); but has in the exercise of its own jurisdiction made such an appointment: *In re Drewe's Settlement Trusts* (5), and has done so even where some of the persons interested were infants: *In re Liddiard* (6). Here it is proposed to appoint one person resident within the jurisdiction and two without. All the persons interested have long been resident in *Canada*, and the two proposed Canadian trustees have already been acting in the trust.

[He also referred to *In re Long's Settlement* (7), *In re Hill's Trusts* (8), and *Lewin* on Trusts (9).]

STIRLING, J.:—

It is only in very exceptional circumstances that persons resident out of the jurisdiction ought to be appointed trustees; and I am under the impression that I have already declined to appoint such persons to be trustees in a case which resembled *In re Liddiard*. But in this case the subject-matter of the settlement is real estate, and if there were no power of sale in the settlement so that the property could not be removed out of the jurisdiction of the Court, I think that under the circumstances I should appoint the two persons resident in *Canada*, who have indeed already acted, to be new trustees. There is some difficulty as to the terms of the proposed appointment of Mr. *Lloyd*.

Farwell:—There is a power of sale in the settlement exercis-

(1) 16 Jur. 852.
(2) 1 Coll. 335.
(3) 20 W. R. 695.
(4) 27 W. R. 52.
(5) W. N. 1876, p. 168.
(6) 14 Ch. D. 310.
(7) 17 W. R. 218.
(8) W. N. 1874, p. 228.
(9) 8th Ed. p. 662.

STIRLING, J. 1887 *In re* FREEMAN'S SETTLEMENT TRUSTS.

able by the trustees, with the consent of the persons for the time being entitled to the life interests thereunder. As to the appointment of Mr. *Lloyd*—he is not prepared to act as trustee and manage the property and collect the rents, which the evidence shews involves the expenditure of a good deal of time and trouble, unless the commission he has hitherto received is continued, nor have we been able to find any one who is prepared to undertake this without remuneration. There is authority to shew that the Court will, under certain circumstances, where it will be for the benefit of the estate, authorize both prospective and retrospective allowances to a trustee for time, pains, and trouble in the management of an estate: *Marshall* v. *Holloway* (1); *Lewin* on Trusts (2).

STIRLING, J.:—

Upon being satisfied as to the propriety of Mr. *Lloyd* being paid a commission, I think I ought to appoint him to be a trustee together with the other two gentlemen who are resident out of the jurisdiction. But I shall require an affidavit from Mr. *Lloyd* stating the number of the holdings into which the property is divided, and the amounts of the rents payable, and the dates of payment; and if I am satisfied that it is necessary that Mr. *Lloyd* should receive a remuneration for collecting the rents, and that the proposed remuneration is a proper one, I shall be prepared under the peculiar circumstances of this case to allow him to continue to receive his commission. If Mr. *Lloyd* dies, the trustees resident in *Canada*, or the survivor of them, will be able to exercise the power of appointing new trustees contained in the settlement, and they must give an undertaking not to appoint any new trustee out of the jurisdiction without the consent of the Court. Subject to this and to the production of the affidavit I have mentioned, I will make the order asked for.

Nov. 19. *Farwell* now produced an affidavit by Mr. *Lloyd* which the Court considered satisfactory, and an order was made according to the prayer of the petition.

Solicitor: *F. Romer.*

(1) 2 Sw. 432, 453. (2) 8th Ed. pp. 630–632.

W. W. K.

MILLS *v.* FOX.

STIRLING, J.

1887

[1885 M. 3869.]

June 28, 29; *Oct.* 27.

Marriage Settlement—Disentailing Assurance—Female Infant—Omitted Property—Mistake.

A public body took, under compulsory powers, certain freeholds at *A.* to a moiety of which (together with much other property) a female infant ward of Court was entitled as one of two tenants in common in tail, and they paid the purchase-moneys into Court. Afterwards, and while the ward was still an infant, proposals for a settlement upon her marriage were carried in on her behalf under the *Infants' Settlement Act*, 1855, in which it was stated that she was entitled as tenant in common in tail to certain specified properties, and that it was proposed to bar the entail in the lady's share in such properties, and to vest the whole of such share, except £13,000, in trustees to be held upon certain trusts. Amongst the properties so specified were included by inadvertence the freeholds at *A.* A settlement founded on these proposals was sanctioned by the Court, and was carried out in 1884 by a disentailing deed, and a deed of declaration of trust, both of which were approved by the Court. The freehold property at *A.* was included in the parcels to the disentailing deed, but no mention of the fund in Court arising from the purchase-money of this property was made, either in the proposals or in the deeds; and the disentailing deed contained no covenant for further assurances, or for the settlement of other or after-acquired property.

The marriage took place, and afterwards, in 1885, the lady attained twenty-one, disentailed the fund in Court, and claimed it as being her absolute property under the *Married Women's Property Act*, and unaffected by her marriage settlement.

In an action by the trustees of the marriage settlement to establish their title to the fund in Court:—

Held, first, that the disentailing deed of 1884 was not effectual to bar the estate tail of the lady in the fund in Court; and

Held, secondly that although in the absence of any contract binding the lady to settle the freeholds at *A.*, the settlement could not be rectified, yet inasmuch as both the marriage and the settlement were sanctioned by the Court upon the faith of a representation made on behalf of the lady that she was entitled in tail to a moiety of the property, the purchase-money of which was represented by the fund in Court, she was bound in equity to make good such representation, notwithstanding her infancy at the time it was made; and that having disentailed the fund in Court, and thus become the only person, besides the Plaintiffs, who could claim any interest in it, she was precluded from setting up any title to the fund in Court adverse to that of the Plaintiffs as trustees of the settlement, and that one moiety of such fund ought to be transferred to and held by them upon the trusts of the settlement.

THIS was an action by the trustees of a settlement made upon the marriage of the Defendants, *George Malcolm Fox*, and *Marion*

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Jane his wife, formerly *Marion Jane Mills*, for the purpose of establishing the title of the Plaintiffs, as trustees of the settlement, to one moiety of a sum of £8495 10*s.* 6*d.* Consols, representing a sum of money paid into Court by the *School Board for London* as the price of certain freehold hereditaments at *Bethnal Green*, taken by them under their statutory powers.

The facts of the case were shortly as follows:—

The Defendant *Marion Jane Fox*, and her sister *Florence Sophia Mills*, were the only children of *John Remington Mills* the younger, who died on the 5th of May, 1865; and under and by virtue of a settlement made in April, 1857, these two ladies upon the death of their grandfather (which occurred on the 2nd of November, 1879), became entitled to real estate of considerable value as tenants in tail in common in equal shares, with cross-remainders in tail between them.

At the death of their grandfather both ladies were infants, and shortly afterwards, on the 6th of December, 1879, an action of *Mills* v. *Morley* was brought on their behalf against the trustees of the settlement of April, 1857, for the administration of the trusts of the settlement; and they thus became wards of Court.

In the early part of the year 1883 the *School Board for London*, acting under its compulsory powers, took the above-mentioned freehold hereditaments at *Bethnal Green* which formed part of the real estate to which *Marion Jane Fox* and *Florence Sophia Mills* became entitled as tenants in common in tail as aforesaid, and paid the purchase-moneys into Court; and such purchase-moneys were invested in the purchase of the above-mentioned sum of Consols, which was carried to the credit of "*Ex parte* the *School Board for London*, the trusts of the settlement dated the 23rd of April, 1857, and of *John Remington Mills*, deceased." The dividends which accrued on this sum of consols were from time to time carried over to the account of the action of *Mills* v. *Morley*, and accumulated.

In the month of November, 1883, *Marion Jane Fox*, then *Marion Jane Mills*, and an infant of nineteen years of age, received an offer of marriage from the Defendant *George Malcolm Fox*, a widower and a major in the army, and the matter was

brought before Mr. Justice *Kay*, in whose Chambers the proceedings in *Mills* v. *Morley* were conducted.

By an order dated the 5th of December, 1883, upon the Defendant *George Malcolm Fox* undertaking not to see or communicate with the Defendant *Marion Jane Fox* (then *Marion Jane Mills*, spinster), save as thereinafter mentioned, and also undertaking that in case he should marry the said *Marion Jane Mills*, either before or after she attained twenty-one, he would concur in any settlement the Court might thereafter approve, it was ordered that he should be at liberty to see *Marion Jane Mills* at the times and in manner therein specified.

On the 23rd of May, 1884, an application was made by *Marion Jane Mills* by her next friend, under the *Infants' Settlement Act* of 1855, and in the action of *Mills* v. *Morley*, that she might be at liberty to intermarry with the Defendant *George Malcolm Fox*, and that a proper settlement upon such marriage might be sanctioned by the Court, and that the applicant might be at liberty to execute such settlement.

Upon this application proposals for a settlement were taken into Chambers. In these proposals it was stated that *Marion Jane Mills* and her sister *Florence Sophia Mills* were entitled in equal shares as tenants in common in tail to certain property, including "freehold properties in the county of *Middlesex* and in the city of *London* of the estimated annual value of £9000," and a sum of £49,337 13*s.* 6*d.* consols in Court to the credit of *Mills* v. *Morley*. It was stated that it was proposed to bar the entail to the share of *Marion Jane Mills* in these properties, and to vest the whole of such share, except a sum of £13,000, in trustees, and that *Marion Jane Mills* wished out of the £13,000 to have £12,000 for her own disposal (her object being to give that amount to her mother), and to have the remaining £1000 for necessary expenses in connection with her marriage. The proposed trusts of the settlement were then stated, being for the benefit of the Defendant Mrs. *Fox* during her life, and then (subject to a power exerciseable in favour of *George Malcolm Fox* during his life) for the benefit of the children and remoter issue of the marriage. In support of the application there was read an affidavit made by the trustees of the settlement, the trusts of which were being

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administered in *Mills* v. *Morley*. In the schedules thereto were set out particulars of the real estate subject to the trusts of that settlement, including the property at *Bethnal Green* taken by the *London School Board*, as above mentioned. It was alleged by the statement of claim in the action, that, in preparing the proposals and schedules, the sale of the freehold hereditaments at *Bethnal Green* taken by the School Board had been inadvertently lost sight of and forgotten, and in fact neither the proposals nor schedules contained any reference to the purchase-moneys, but included the whole of the lands sold, although at the time *Marion Jane Mills* had no longer any interest in them. The matter was referred to the conveyancing counsel of the Court, who prepared two drafts for the purpose of effecting the settlement, one being that of a disentailing assurance, and the other of a declaration of trust.

On the 21st of July, 1884, an order was made whereby the Judge, being of opinion that the proposed marriage of the infant applicant, *Marion Jane Mills*, with *George Malcolm Fox*, was a fit and proper marriage, and that the settlement proposed to be effected by the two indentures (of which the drafts had been prepared as above mentioned) was a proper settlement to be made upon or in contemplation of such marriage, "of the property of the infant comprised therein," and that the said two several indentures were respectively proper indentures for giving effect to such settlement, did, pursuant to the *Infants' Settlement Act*, 1855, sanction and approve of such settlement, and ordered that the infant *Marion Jane Mills* should be at liberty, upon and in contemplation of her marriage with *George Malcolm Fox*, to execute the said two indentures accordingly, and that upon the due execution of the said indentures respectively by *George Malcolm Fox* and *Marion Jane Mills* (such execution to be certified), they should be at liberty to intermarry.

The indentures, which both bore date the 22nd of July, 1884, were duly executed on that day: and the execution was duly certified.

By the disentailing deed (which contained a full recital of the order of the 21st of July, 1884), it was witnessed that in obedience to the said order and in consideration of the then intended

marriage, *Marion Jane Mills*, with the sanction and approbation of the Court, and with the consent of *George Malcolm Fox*, did thereby grant and dispose of unto the trustees and their heirs—"First, all that the undivided moiety of or to which the said *Marion Jane Mills* is seised or entitled as tenant in tail in possession of and in all and singular the messuages, mills, farms, lands, tenements, *New River* share, and hereditaments described or comprised in the first schedule hereto, and of and in all other, if any, the freehold hereditaments which by any means or in any manner are now subject at law or in equity to the subsisting uses" of the indenture of settlement of 1857. And secondly, "all that the undivided moiety of or to which the said *Marion Jane Mills* is seised or entitled as tenant in tail in remainder" in the same property. The first schedule so referred to included the freehold hereditaments at *Bethnal Green* taken by the *London School Board*.

By a further witnessing part *Marion Jane Mills* assigned and disposed of to the trustees, their executors, administrators, and assigns,—First, all that equal half part or share to which the said *Marion Jane Mills* was then entitled for an estate tail, or interest in the nature of an estate tail in possession, in four specific sums of Consolidated and New £3 per Cents., part of which represented the purchase-moneys of lands taken by corporate bodies, other than the *London School Board*, in execution of statutory powers. Secondly, all that equal half part or share to which she was entitled for an estate tail in remainder or reversion expectant on the determination or failure of the estate tail of *Florence Sophia Mills* therein of and in the same sums; and thirdly and fourthly, certain other sums of consols and cash not including the fund in question in this action.

The deeds contained no covenants for title, nor any covenant for the settlement of other or after-acquired property.

The marriage between the Defendants was duly solemnized on the 23rd of July, 1884.

In the year 1885 Mrs. *Marion Jane Fox* attained the age of twenty-one years, and on the 23rd of June, 1885, she executed a disentailing assurance whereby she assigned to the Defendant *Eland* a moiety of the said sum of £8495 10*s.* 6*d.* Consols to which she claimed to be entitled for an estate tail in possession,

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and, subject to the estate tail therein of her sister *Florence*, the other moiety thereof to which she claimed to be entitled for an estate tail expectant on the determination of the estate tail of *Florence* to hold to *Eland* freed from the estate tail of her the Defendant *Marion Jane Fox* in trust for her absolutely.

On the 25th of June, 1885, Mr. and Mrs. *Fox* and the Defendant *Eland* presented a petition to the Court praying that one moiety of the sum of £8495 10*s.* 6*d.* Consols in Court might be sold and the proceeds paid to the Defendant *Marion Jane Fox* on her separate receipt.

Upon the hearing of the petition before Mr. Justice *Kay* on the 8th of August, 1885, it was ordered that the trustees of the marriage settlement and disentailing deed of 1884 should take such proceedings as they might be advised to rectify such deeds so as to bring the said sum of £8495 10*s.* 6*d.* within the limits thereof in case the Defendants should refuse to execute the necessary deed for that purpose; and it was further ordered that the dividends on the fund in Court should be paid to Mrs. *Fox*, during her life or until further order, and that the rest of the petition should stand over to abide the result of the proceedings.

Mr. and Mrs. *Fox* having refused to execute any deed for the purpose of bringing the £8495 10*s.* 6*d.* under the operation of the deed of 1884, this action was brought for a declaration that one moiety of the fund in Court and the other moiety thereof subject to the estate tail of *Florence Sophia Mills* therein were, according to the true construction of the deeds of the 22nd of July, 1884, comprised in and settled by such deeds respectively, and if the Court should be of opinion that the said moieties were not, or that either of them was not, included in the said deeds, then a declaration that such moieties were by mistake omitted therefrom and ought to have been included therein; and to have all proper deeds and documents executed by the Defendants for settling such moieties on the trusts of the said deeds, and, so far as necessary, to have the said deeds and settlements rectified.

This action now came on for hearing.

Robinson, Q.C., and *Ingle Joyce*, for the Plaintiffs:—

The general words at the conclusion of the first witnessing part

of the disentailing assurance of 1884, viz., "And all other, if any, the freehold hereditaments which by any means or in any manner are now subject at law or in equity to the subsisting uses of the said indentures of settlement," are quite sufficient to comprise the purchase-moneys in question, and upon the true construction of this deed they passed under it.

But if not, it is a clear case of mistake. The intention of all parties and of the Court manifestly was to settle all the lady's property, except the £13,000 which was to be dealt with in a particular way, and the Court would not have sanctioned a settlement by an infant ward from which an important part of her property was excluded.

Hastings, Q.C., and *Vaughan Hawkins*, for the Defendants:—

The proposals for the settlement did not mention, and the settlement and disentailing assurance did not deal with, include, or affect the £8495 10*s.* 6*d.* Consols in question. This fund was not within the marriage contract, and Mrs. *Fox* having now disentailed her interest in it, is absolutely entitled to one moiety of it for her separate use.

This is not the case of a settlement intended to include the whole property of the lady. Other property besides this particular property is expressly excluded, viz., the £13,000; and there is no covenant or agreement, express or implied, constituting a contract to settle Mrs. *Fox's* interest in this fund in Court. Again, her interest in it did not and could not pass under the general words, "all other freehold hereditaments then subject to the uses of the settlement," for such words did not aptly describe them. Under sect. 71 of the *Fines and Recoveries Act*, "money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein," must be assigned by deed, and a grant is not sufficient. So that these purchase-moneys were never either disentailed or assigned by deed.

The settlement that was executed was not a settlement by the Court but by Mrs. *Fox*, who, being an infant, could contract and settle only under the *Infants Settlement Act*, 1855 (18 & 19 Vict. c. 43), and with the sanction of the Court; and there being no

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other contract except that carried out by the settlement of the 22nd of July, 1884, which the Court has sanctioned, there can be no rectification or alteration of it. The Court has no power to compel Mrs. *Fox* to execute a disentailing deed or to settle this property: *Buckmaster* v. *Buckmaster* (1); *Hilbers* v. *Parkinson* (2); *Davis* v. *Tollemache* (3).

Robinson, in reply:—

[STIRLING, J.:—This lady is the absolute legal owner of a moiety of this fund, which apparently is not affected by the settlement made upon her marriage. In the absence of fraud, must not the inclusion of this fund in the settlement rest on contract?]

The marriage and the settlement made upon it were both sanctioned by the Court upon the faith of a representation made by or on behalf of the infant that she was at the time entitled to an estate tail in a moiety of the freehold hereditaments, the purchase-money whereof is represented by the fund in Court. Under these circumstances it is not necessary to prove any specific contract with reference to the fund itself. In equity the lady is bound to make good the representation so made, and is estopped from setting up any title in herself in conflict therewith. Accordingly, neither she nor her husband can now take advantage of the mistake, which would not have occurred if the Court had been aware of the existence of this fund, and ask that the money which represents property the settlement purported to include may be paid out to them.

[STIRLING, J.:—How was the infant bound to settle anything beyond the property comprised in the order approving the settlement?]

The order was not a decision of the Court. It was only an inaccurate direction founded on a misapprehension. [He referred to *In re Wood's Settled Estates* (4); *Attorney-General* v. *Day* (5).]

(1) 35 Ch. D. 21.
(2) 25 Ch. D. 200.
(3) 2 Jur. (N.S.) 1181.
(4) Law Rep. 20 Eq. 372.
(5) 1 Ves. Sen. 218.

1887. Oct. 26. STIRLING, J. (after stating the facts of the case, continued):—

STIRLING, J.

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It now appears that the property in question had been taken by and conveyed to the *London School Board*, and that the purchase-money for the same had been paid into Court previously to May, 1883, so that on and subsequently to May, 1884, the Defendant *Marion Jane Fox* had no estate or interest in the lands.

The Defendants, Mr. and Mrs. *Fox*, contend that the settlement and disentailing deed of 1884 do not comprise or deal with or in any way affect the fund in Court representing the proceeds of sale taken by the *London School Board*, and Mrs. *Fox* having disentailed her interest in the fund, claims by virtue of the *Married Women's Property Act* to be absolutely entitled to one moiety thereof for her separate use.

It is quite clear that the proposals carried into Chambers and the settlement made in pursuance thereof were framed upon the mistaken supposition that the property taken by the School Board remained unsold. The sale and settlement were both carried out by the same firm of solicitors, and the error is traced to the circumstance that the Chancery and conveyancing departments of the office are distinct, and that the clerk in charge of the Chancery department was unacquainted with what had taken place in the conveyancing department.

The question now arises, what are the rights of the Plaintiffs in respect of the fund in Court?

It was contended on their behalf that on the true construction of the disentailing deed the fund in question passed under it.

Now the fund is certainly not specifically mentioned in the deed, and the second of the two witnessing parts which deals with funds which were then in the nature of personalty, but were liable to be invested in lands, contains no general words sufficient to embrace the fund in question; and the Plaintiffs are thus driven to contend that it passed under the general words in the first witnessing part, whereby Mrs. *Fox* granted and disposed of unto the Plaintiffs and their heirs her moieties in possession and reversion of and in the hereditaments "described or comprised in the schedule hereto, and all other, if any, the freehold hereditaments which by any means or in any manner are now

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subject at law or in equity to the subsisting uses of the said indenture of settlement."

To this it was answered that sect. 71 of the *Fines and Recoveries Act* requires a disentailing assurance of "money subject to be invested in the purchase of lands to be settled, so that any person if the lands were purchased, would have an estate tail therein," to be an "assignment by deed," and not a grant; and, further, that the words "freehold hereditaments" were not apt to carry such money. I am of opinion that this contention is well founded to this extent: that the disentailing deed was not effectual to bar the estate tail of Mrs. *Fox* in the fund. It contains no covenant for further assurance, nor any covenant for the settlement of other or after-acquired property, and having regard to sect. 47 of the *Fines and Recoveries Act*, it would seem that I am not at liberty either to treat the deed as raising a contract for making a perfect instrument or to remedy its defects of form: see *Bankes* v. *Small* (1). It was not contended, nor does it appear to me, that the contemporaneous declaration of trust aids the Plaintiffs.

It was said, however, that the plain intention of the Court and of all parties was to settle the whole of the property of the Defendant Mrs. *Fox* except the £13,000 mentioned in the proposals: that this intention had not been carried into effect, and that the disentailing deed and settlement ought to be rectified in accordance therewith. To this it was objected that (as shewn by the recent case of *Buckmaster* v. *Buckmaster* (2)) the settlement is not that of the Court but of Mrs. *Fox*; and that Mrs. *Fox* could only settle or contract to settle under the provisions of the *Infants' Settlement Act*, 1855, and with the sanction of the Court, and that the only settlement or contract for a settlement which the Court had sanctioned was that contained in the deeds of the 22nd of July, 1884, and that the Court had no power to alter them. I think that these objections are of great weight, and I am unable to see how it is possible to rectify the deeds in the absence of any independent contract binding on Mrs. *Fox*.

It was, however, further contended on behalf of the Plaintiffs that both the marriage and the settlement were sanctioned by the Court on the faith of a representation of fact made by her or on

(1) 36 Ch. D. 716. (2) 35 Ch. D. 21.

her behalf, that at the date of the order of the 21st of July, 1884, the Defendant Mrs. *Fox* was entitled to an estate tail in one moiety of the property, the purchase-money of which is represented by the fund in Court, and that in equity she is bound to make good such representation, or, at all events, to abstain from setting up in herself any title to the fund inconsistent therewith.

The law on this subject is thus stated by Lord *Cranworth* in the well-known case of *Jorden* v. *Money* (1). At page 210 he makes these remarks: "It is said that upon a principle well known in the law, founded upon good faith and equity, a principle equally of law and of equity, if a person makes any false representation to another, and that other acts upon that false representation, the person who has made it shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood which has so misled the other. That is a principle of universal application, and has been particularly applied to cases where representations have been made as to the state of the property of persons about to contract marriage, and where, upon the faith of such representations, marriage has been contracted. There the person who has made the false representations has in a great many cases been held bound to make his representations good." His Lordship then refers to the cases of *Neville* v. *Wilkinson* (2); *Montefiori* v. *Montefiori* (3), and *Gale* v. *Lindo* (4); and then there follows (p. 212) a passage which seems to me of considerable importance with reference to this case: "These principles are plainly and perfectly intelligible, and quite consistent with good sense, and I should be in the last degree sorry that any opinion or decision to which I am a party, should lead to a notion that I, in the slightest degree, question their propriety. Nay, more, I think that the principle has been carried, and may be carried, much further; because I think it is not necessary that the party making the representation should know that it was false; no fraud need have been intended at the time. But if the party has unwittingly misled another, you must add that he has misled another under such circumstances that he had reasonable ground for supposing that the person whom he

(1) 5 H. L. C. 185.
(2) 1 Bro. C. C. 543.
(3) 1 W. Bl. 363.
(4) 1 Vern. 475.

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was misleading was to act upon what he was saying. It will not do if he merely said something, supposing it to be quite right, and then that some stranger, having heard and acted upon it, should afterwards come to him to make it good." So that Lord *Cranworth* distinctly lays it down that it is not necessary that the party making the representation should know it was false, or that fraud need have been intended at the time; and the only limitation which he places upon the application of the principle is this—that the person to enforce it must be someone whom the person who made the representation had reasonable ground for supposing to be about to act on the representation.

In the case of *The Citizens' Bank of Louisiana* v. *First National Bank of New Orleans* (1) Lord *Selborne* says: "I apprehend that nothing can be more certain than this, that the doctrine of equitable estoppel by representation is a wholly different thing from contract, or promise, or equitable assignment, or anything of that sort. The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representations had not been made; then the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were true, and shall be compelled to make them good. But those must be representations concerning existing facts." He then proceeds: "The limits of that doctrine, and the distinction between it and contract, were carefully examined, and, I think, well pointed out in the judgment given by Lord *Cranworth* in this House in the case of *Jorden* v. *Money* (2)."

There is much more that is of great importance in both the judgments of Lord *Selborne* and Lord *Cranworth* in those cases, but I think I have read all that I need cite for the purpose of the present case.

(1) Law Rep. 6 H. L. 352, 360. (2) 5 H. L. C. 185.

Now in the present case the proposals for the settlement carried in on behalf of Mrs. *Fox*, and the affidavit in support of it, constituted a representation of fact made on behalf of Mrs. *Fox*, that she was, at the date of them, tenant in tail of the property in question and had power to convey it by means of a disentailing assurance; and the Court, being applied to by her to sanction the contemplated marriage, gave such sanction on the faith of that representation, and on the terms that the property to which it related should (along with other property) be disentailed, and conveyed to trustees, and thus secured for the benefit of Mrs. *Fox* and the issue of the contemplated marriage, which in fact was not allowed to take place until the Court had ascertained that the proper assurances had been executed by Mrs. *Fox* and her husband. Under these circumstances the case appears to me to be brought within the principle laid down by Lord *Cranworth* and Lord *Selborne*.

Various points were however made on behalf of the Defendants, and it may be right that I should deal with them in detail.

It was said that the representation was entirely innocent, and was a mere mistake, and that there was no fraud. As regards the innocent nature of the representation and the absence of fraud, the objection appears to me to be met by what is laid down by Lord *Cranworth* in *Jorden* v. *Money* (1), in the second of the passages which I have cited; and the present Plaintiffs, the trustees of the settlement sanctioned by the Court, cannot in my opinion be regarded as strangers who are not entitled to call on Mrs. *Fox* to make the representation good.

Mistake, again, may well be a ground of relief in cases where it is of such a nature that it would be inequitable to enforce the obligation arising out of the representation made. In the present case it was the meaning and intention of all parties, and of the Court, that the whole of the lady's property, except the sum of £13,000, should be settled; and the mistake which actually occurred amounts to little more than a misdescription of part of that property.

Under these circumstances it appears to me that, so far from the mistake giving rise to any equity to relief from obligation,

(1) 5 H. L. C. 185.

STIRLING, J. 1887 MILLS v. FOX.

there would be a failure of equity if the obligation were not enforced to the extent of Mrs. *Fox's* interest in the fund which represents the purchase-money of the property taken by the *London School Board.*

It was further said that, at the date of the order and of the marriage, Mrs. *Fox* was simply tenant in tail of the fund; that the Court could not have ordered her after her marriage to execute a disentailing deed of the fund, for which proposition the case of *Hilbers* v. *Parkinson* (1) was cited; and that the circumstance that she has in fact executed a disentailing deed ought not to prejudice her. If she had not executed the disentailing deed, it may be that I should have found it necessary to inquire to what extent a Court of Equity will actively interfere to enforce the making good of representations, and whether in so interfering it will order the execution of a disentailing deed: and in dealing with the latter point the principles laid down by the Court of Appeal in the recent case of *Bankes* v. *Small* (2) (to which I have referred) would have to be regarded. But I think that I am relieved by Mrs. *Fox's* own act from any such inquiry. By reason of the execution of the disentailing assurance, she has become since her marriage the only person (other than the Plaintiffs) who can claim any interest in the fund in Court. Now the doctrine laid down by Lord *Cranworth* and Lord *Selborne*, and the cases cited by the former, appears to me to shew that a person who has made such a representation as is referred to will not be allowed by a Court of Equity to set up on his own behalf, as against the persons entitled to the benefit of the representation, a claim founded on the untruth of the representation he has made.

In the words of Lord *Cranworth*, "the person who has made the representation shall not afterwards be allowed to set up that what he said was false, and to assert the real truth in place of the falsehood." When Mrs. *Fox* applied to the Court to sanction her marriage, the representation was made on her behalf that she was then tenant in tail of one moiety of the property taken by the School Board, and she obtained the sanction for which she asked upon that representation. She was thereby precluded (as between herself and the Plaintiffs) from denying the

(1) 25 Ch. D. 200. (2) 36 Ch. D. 716.

truth of that representation; and she is consequently precluded from denying that one moiety of the property taken by the School Board was, at the date of the order, vested in her in tail, and that it was effectually disentailed and assured to the Plaintiffs upon the trusts of the settlement; and that the Plaintiffs as such trustees became, as between her and them, absolute owners of the property, and consequently that they have been since the marriage and still are entitled to the purchase-money payable in respect of it. She can only make out her title to that purchase-money by alleging that in truth she had not, at the date of the disentailing deed, any interest in the property at all, but that the property had long before been conveyed to the School Board. That, in my judgment, she is not at liberty to do, and I think that her position in this respect is not affected by the circumstance that she was an infant when the representation was made. I propose, therefore, to declare that the Defendants are precluded from setting up any title to the funds in Court, adverse to that of the Plaintiffs as trustees of the indentures of the 21st of July, 1884, in the pleadings mentioned, and that one moiety of such fund ought to be transferred to the Plaintiffs upon the trusts of the second of such indentures.

The petition, which stood over to abide the result of this action, should as a matter of form be put into the paper next Saturday.

1887. Oct. 29. The petition accordingly came on again for further hearing, and an order was made that one moiety of the fund in Court should be transferred to the Plaintiffs as the trustees of the settlement of 1884, to be held by them upon the trusts thereof, and that the *School Board for London* should pay the Petitioners' and the trustees' costs up to and including the hearing before Mr. Justice *Kay;* the subsequent costs to be paid by the trustees out of the trust fund transferred to them.

Solicitors: *Hollams, Son, & Coward; Palmer, Eland & Nettleship.*

W. W. K.

C. A.
1887
Nov. 4.

J. S. GREPE *v.* LOAM.
[1879 G. 78.]

BULTEEL *v.* J. GREPE.
[1879 B. 264.]

Form of Order to prevent repeated frivolous Applications.

Repeated frivolous applications for the purpose of impeaching a judgment having been made by the same parties, the Court of Appeal made an order prohibiting any further application without leave of the Court.

THE first of these actions was tried by Vice-Chancellor *Hall*, who gave judgment on the 5th of July, 1879. The second action, relating to the same property, was also tried by Vice-Chancellor *Hall*, and judgment given on the 6th of June, 1882. Among the Plaintiffs in the first action and the Defendants in the second were *Hector William Grepe* and his brothers and sisters, then infants. Notice of appeal against this judgment was given by the infant Defendants in the year 1883. This appeal was abandoned, and by order of the 9th of April, 1884, the costs of the Respondents were ordered to be paid by the next friend of the Appellants.

Subsequently, in November, 1885, April, 1886, June, 1887, and July, 1887, various applications were made by the same parties, some to the Court below and some to the Court of Appeal, the object of all such applications being either directly to set aside the judgment of the 6th of June, 1882, or for orders in direct contradiction to the directions of that judgment. All such applications were dismissed with costs, none of which had been paid.

On the 27th of October, 1887, notice of motion was given by *Hector William Grepe* and his brothers and sisters "for an order to arrest the minutes of judgment in the second above-mentioned actions on the following grounds." . . . . Some of the brothers and sisters were still minors, and moved by their next friend.

H. W. Grepe moved in person on behalf of himself and the other Applicants.

Charles Browne, and *Badcock*, appeared for the different Respondents, but were not called upon.

THE COURT (*Lindley* and *Lopes*, L.JJ.) considered the application to be wholly unfounded, and dismissed it with costs.

Charles Browne then stated that several unfounded applications of this kind had been made by the same parties, and asked the Court to make an order to prevent their repetition, as it was impossible to obtain payment of the costs. He referred to an unreported case of *Suir* v. *Newton*, in which an order had been made guarding against a repetition of such applications without leave of the Court.

LINDLEY, L.J., said that he had a recollection of such an order having been made, and the Registrar was directed to refer to it (1).

Ultimately the following direction was inserted in the order:—

"That the said Applicants or any of them be not allowed to make any further applications in these actions or either of them to this Court or to the Court below without the leave of this Court being first obtained. And if notice of any such application shall be given without such leave being obtained, the Respondents shall not be required to appear upon such application, and it shall be dismissed without being heard."

Solicitors for Respondents: *Surr, Gribble, & Co.; Crowders & Vizard.*

(1) In *Suir* v. *Newton* no order was drawn up, but the indorsement on counsel's brief, which agreed with the Registrar's minute-book, was as follows:—

"L.JJ. June 9th, 1886.

"Motion to stand over until the costs by the order of the 21st of May, 1886, ordered to be paid by the Defendants, have been paid, with liberty to Defendants to apply to have the motion restored to the paper when such costs have been paid. And in the meantime no notice of motion is to be given by or on behalf of the Defendants without the special leave of the Court; and if any such notice shall be given without such leave being obtained, the Respondents shall not be required to appear upon such motion, and it shall be dismissed without being heard."

H. C. J.

C. A.
1887
KEKEWICH, J.
Oct. 29.
C. A.
Nov. 16, 23.

LIVERPOOL HOUSEHOLD STORES ASSOCIATION *v.* SMITH.

[1887 L. 2938.]

Practice—Injunction to restrain Libel.

Since the passing of the *Judicature Acts* the Court has jurisdiction to restrain by interlocutory injunction the publication of a trade libel, but as, if it grants such an injunction, it must pronounce the publication to be libellous before it has been found so by a jury, the jurisdiction is to be exercised only in the clearest cases, where any jury would say that the matter complained of was libellous, and where if they found otherwise their verdict would be set aside as unreasonable.

The question as to granting injunctions to restrain publication in a newspaper of reports and correspondence containing unfavourable statements as to the position and solvency of a joint stock company, considered.

Injunction to restrain the publication of future articles reflecting unfavourably on a company, refused on the ground of the difficulty of granting an injunction which would not include matters that might turn out not to be libellous; and because if the injunction was granted in terms to restrain what was libellous, the question of libel or no libel would have to be tried in a very unsatisfactory way on motion to commit.

THE company was registered on the 1st of September, 1887, with a nominal capital of £100,000, divided into £1 shares. Its object was the carrying on co-operative stores at *Liverpool*. The prospectus inviting applications for shares was issued on the day of registration. Upwards of 33,000 shares were allotted, the number of shareholders being 1233.

The first directors were, under a power given by the articles, appointed by the subscribers to the memorandum of association. Two of the directors so appointed were Mr. *John Wrigley* and Mr. *Hugh Cullen*, who had applied for shares. At a meeting of directors held on the 21st of September, considerable difference of opinion arose as to which of two properties should be purchased for the place of business of the company. Messrs. *Wrigley* and *Cullen* were in the minority on this question, and on the following day they sent in letters by which Mr. *Cullen* resigned his directorship and withdrew his application for shares, and Mr. *Wrigley* resigned his directorship. Mr. *Wrigley* had intended to apply for shares but did not apply.

On the 19th of October the first statutory meeting of shareholders was held, and was attended by 146 shareholders, representing a capital of £5795. At this meeting a resolution was proposed by one of the shareholders, that a meeting should be called to consider the advisability of winding-up the company. He was informed that the meeting could only be called on the requisition of shareholders holding one-fifth of the capital. On the following day a requisition signed by sixty-four shareholders, holding in all 3650 shares, was left at the company's office, requesting the calling a special meeting for that purpose.

At the meeting of the 19th of October, remarks unfavourable to the company were made by the proposer of the resolution; his grounds of complaint being that the company was, as he alleged, starting with insufficient capital and was in debt, having contracted to buy business premises at a price exceeding the amount of the capital subscribed for, and that Messrs. *Wrigley* and *Cullen*, in reliance on whose names he had taken shares, had retired from the directorship. Upon the close of this meeting an extraordinary general meeting was held to consider whether some remuneration should be given to the promoter for his trouble, and after a very stormy discussion, the meeting resolved to give him no remuneration.

A full report of this meeting appeared in the *Liverpool Mercury*, of the 20th of October, and its accuracy was not disputed.

On the 21st of October, the following letter appeared in the *Liverpool Mercury*:—

"The *Liverpool Household Stores Association* (*Limited*).

"To the Editors of the *Liverpool Mercury*.

"Gentlemen,—On the strength, principally, of the names of Mr. *Hugh Cullen* and Mr. *John Wrigley* appearing as directors on the prospectus of the *Liverpool Household Stores Association* (*Limited*), I and a number of my friends took shares in the company, and we were much surprised to learn at the statutory meeting yesterday that these gentlemen had retired from the directorate and withdrawn their applications for shares. Had their retirement received the same publicity as the company's prospectus did, advertising their names as directors, the hard-earned savings of many working people would not be at present jeopardized, and

C. A. 1887 LIVERPOOL HOUSEHOLD STORES ASSOCIATION v. SMITH.

I consider that these gentlemen are bound in honour to see us out of our trouble with as little loss as possible. I assume that Messrs. *Cullen* and *Wrigley* are aware of the angry and indignant meeting yesterday, as well as of the cause of the indignation. I also assume that they are aware that a requisition to call another meeting was unanimously signed, for the purpose of taking into consideration whether the company should be wound up or otherwise liquidated. Messrs. *Cullen* and *Wrigley* are bound in honour to give the shareholders a full and candid explanation of the causes that led to their retirement from the directorate of the company; and they are equally bound to do everything in their power to see us out of our trouble.

"October 20, 1887." "A SHAREHOLDER."

On the same day the company's solicitors wrote to the editor of the *Liverpool Mercury*, complaining of the above letter as being a direct attack on the solvency and credit of the company, and asking for the name of the writer.

The editor replied, refusing to give up the name, and saying, "The letter referred to seems to arise naturally enough out of the proceedings at the meeting of the *Liverpool Household Stores Association (Limited)*, on the previous day, and to contain no imputation which was not publicly made thereat and reported in the newspapers."

On the 24th of October the following letter appeared in the "*Liverpool Mercury*."

"*The Liverpool Household Stores Association.*

"To the Editors of the *Liverpool Mercury.*

"Gentlemen,—Allow me to endorse the remarks of 'A Shareholder" in Friday's *Mercury*. Unless Messrs. *Hugh Cullen*, J.P., and *John Wrigley*, J.P., explain and make amends for their conduct, they will merit the utmost censure. Let me suggest the appointment of a shareholders' committee for the winding-up of the company, and the resort to the best legal advice, and to this end the formation of a fund, to which I for one shall be happy to contribute a *quota*. "A LADY SHAREHOLDER.

"October 21, 1887."

The company after seeing this letter issued their writ in this

action against the publishers and the editor of the *Liverpool Mercury*, stating their claim to be "for damages for libel and for an injunction," and on the 26th of October gave notice of motion that the Defendants might be restrained from printing or publishing in the *Liverpool Mercury* or any other newspaper of which the Defendants or either of them were or was the proprietors or proprietor or the editors or editor, of any articles, letters from correspondents, or any other matter containing assertions, imputations, or suggestions that the company was insolvent or incapable of carrying on its business with success, or that the shareholders did at the general meeting unanimously sign or propose a resolution to the effect that another general meeting of the company should be convened for the purpose of taking into consideration whether the company should be wound up or otherwise liquidated; or any articles, correspondence, or other matter suggesting that a committee of the shareholders should be appointed for the purpose of winding up the company or having recourse to legal advice for that purpose, and the formation of a fund with a view to carrying such purpose into effect, or imputing motives for the recent resignation of two of the directors of the company which tended to the prejudice of the company, and to hamper the present directors from conducting and managing the business of the company with success, or which might prevent other persons from applying for the allotment to them of shares in the company.

It was not alleged by the Defendants that the statement in the first letter as to a requisition for a meeting to consider a winding-up having been signed unanimously was correct, and evidence was given on behalf of the company that the allegations as to insolvency were unfounded. The defence set up was that the letters were inserted without malice or negligence as matters of interest affecting a public company which had invited the public to take its shares, and which was of considerable interest to the *Liverpool* public. Evidence was given that upon the publication of the report and letters the applications for shares seriously fell off.

The motion came on before Mr. Justice *Kekewich* on the 29th of October, 1887.

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LIVERPOOL HOUSEHOLD STORES ASSOCIATION v. SMITH.

R. Neville, and *Dunham*, for the Company :—

We complain of the report of the general meeting, and of two letters. The report is perfectly correct, but the statements made at the meeting were untrue and libellous, and as the meeting was a private and not a public meeting of shareholders, the Defendants cannot claim privilege, 44 & 45 Vict. c. 60, s. 2. No doubt, the report is not likely to be republished, and the damage it has done will be a question for the jury at the trial; but the publication of further letters like those complained of may cause irreparable injury, and may force the company into liquidation, and ought to be immediately restrained : *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (1); *Hill* v. *Hart Davies* (2); *Quartz Hill Consolidated Gold Mining Company* v. *Eyre* (3).

Warmington, Q.C., and *Chadwyck Healey*, for the Defendants :—

The Court has no jurisdiction to grant an interim injunction in an action for libel, or, if it has, it will only do so on the rarest occasion : *Coulson* v. *Coulson* (4); *Armstrong* v. *Armit* (5); *Saxby* v. *Easterbrook* (6). Such an injunction has never been granted, and will your Lordship say that this is a "rarest occasion?" This is in truth a matter of public interest. A company that issues a prospectus to the public and appeals to the public for subscriptions cannot complain of any criticism that is *bonâ fide* and fair. *Mala fides* is not suggested here. These reports on companies are matters of daily occurrence in the newspapers, and this report and these letters are fair public criticism, and are privileged.

R. Neville, in reply, cited *Marks* v. *Conservative Newspaper Company* (7); *Odger* on Libel (8); *Popham* v. *Pickburn* (9); *Purcell* v. *Sowler* (10).

Warmington, Q.C., referred to *Odger* on Libel (11).

(1) 20 Ch. D. 501.
(2) 21 Ch. D. 798.
(3) 11 Q. B. D. 674.
(4) 3 Times L. R. 846.
(5) 2 Times L. R. 887.
(6) 3 C. P. D. 339.
(7) 3 Times L. R. 244.
(8) Pages 30, 260.
(9) 7 H. & N. 891.
(10) 2 C. P. D. 215.
(11) Page 50.

KEKEWICH, J.:—

I fully recognise the importance of this case, not merely to the parties litigating, but to those whom they represent. The question concerns the liberty of the press, which is a matter of considerable importance to all citizens, but which has its limits, and limits which those who are most interested in sustaining the liberty of the press ought to be most anxious to observe. I also recognise the importance of the case as bearing upon the jurisdiction of the Court, especially as regards interlocutory applications. I entertain myself no doubt whatever, and I think I should be contravening many authorities if I expressed any doubt, that it is quite competent for the Court to grant an interlocutory injunction in a case of libel or slander. The Court is constantly appealed to to grant an injunction in order to prevent irreparable injury even where there is a matter of extreme delicacy in point of law to be decided at the trial. If the Court sees that there is a fair question to be tried, and that there will be irreparable injury unless an injunction issue, the injunction is granted on interlocutory motion, notwithstanding that there is a possibility that the Court itself, or the Court of Appeal, or the House of Lords may hereafter decide the question of law adversely to the plaintiff. That is exactly what one has to consider on an interlocutory application in a case like this, the only difference being this, that instead of the Court deciding the question a jury will probably have to decide it, and therefore the Court has to be more cautious in expressing an opinion lest it should influence the minds of a jury, who are supposed to be more liable to be influenced than a judge of first instance or the Court of Appeal. Whether that be so or not is fairly open to question. But that is the principle upon which the Court is reluctant to express an opinion, or to grant an injunction, which might be equivalent to expressing such an opinion. Bearing this in mind I first turn to the report of the meeting. The report is admitted to be accurate. I find that the notice of motion does not mention the report, but the words "other matter" in the notice of motion would cover it as well as any future report. There is some weight in Mr. *Warmington's* argument. It points to this — that this joint stock company asks for support, issues a prospectus, and

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endeavours to obtain subscriptions for shares, and that having once applied to the public in such a manner, it is open to public criticism, or, at any rate, may be safely criticised, whether such criticism may result in advantage or disadvantage. That is the position taken up by the Defendants, and that is the question which is not unlikely to require careful decision ere long in this or some other case. It does not require decision now, and I do not propose to express any opinion upon it; but when it does come on to be considered some matters will have to be discussed more minutely than they have been on this occasion, and I cannot but think that the case of *Marks* v. *Conservative Newspaper Company* (1) will have to be criticised more carefully than it has been criticised. As at present advised, I do not construe that judgment as going so far as has been urged. Passing from the report I come to the two letters—one in the *Mercury* of the 21st and the other of the 24th of October. I shall say no more of the letter of the 24th of October, it is only the letter of the 21st which requires and deserves consideration. I have read that letter several times. It is before me now, and I have listened to the arguments upon it. Its general intent is obviously to criticise Messrs. *Cullen* and *Wrigley*, the retiring directors, and not the company. The view of the shareholder who puts his or her name to it is that he or she has been deceived by *Cullen* and *Wrigley*, and that these gentlemen are bound to indemnify the writer, as well as all the other shareholders. But it contains two passages which I think ought not to have been published, and which I am sorry were published. There is a statement that a requisition for another meeting was "unanimously" carried, which is said to be a mistake for "numerously," and it contains also a statement that if the retirement of these gentlemen had been publicly advertised the hard-earned savings of the working people would not be at present jeopardised, as the insinuation is they now are. Mr. *Lovell*, the editor of the *Liverpool Mercury*, was applied to in reference to that letter, but his attention was not called to any suggestion that the word "unanimously" should have been "numerously," or I am sure he would have acknowledged it to be a mistake. It is said that any person of ordinary intelligence reading that letter

(1) 3 Times L. R. 244.

must know that the use of the word "unanimously" is a mistake. I am not of that opinion: I am not sure it was a mistake. I think Mr. *Neville's* criticism has, at any rate, some foundation. I am by no means sure that the writer did not mean unanimous, or practically so, when he wrote that word. I regret that when the editor's attention was called to the letter containing the misstatement, he did not look into it more carefully, and see that such a statement was not inserted in his paper. A more important point is that about the word "jeopardise." I am not going to express any opinion as to the necessary or proper meaning of that sentence. I may say I have not come to any conclusion about the meaning of it. It is an unhappily-worded sentence, which it would have been better not to have written; but it is open to the construction that the retirement of these gentlemen would have an effect upon the hard-earned savings of the people. That, however, may mean a great many things. It may mean that the other directors are not well acquainted with stores of this kind, or that their time is too much occupied to allow them to make themselves acquainted with such things. I do not wish to suggest as a necessary conclusion that it means that the directors were wanting in honesty; or that the company was wanting in solvency. Therefore the question whether this is or is not a libel is left undetermined, unprejudiced by any opinion on my part. But I must express my regret that Mr. *Lovell*, having inserted a letter which might do harm, and which, at any rate, must be vexatious to gentlemen conducting the business of that company, did not, on his attention being called to it, at once frankly say that "in the hurry of publishing a daily paper, I allowed the statement to go, which I ought not to have inserted, and will take care in future." I think that was the proper course for a gentleman occupying the position of editor of a paper which, I am told, has a large circulation. I pass to the letter in which he declines to give up the name of his correspondent (for which I do not blame him at all). Whether he was right or wrong in reporting that meeting fully, as he did, he certainly was wrong according to my impression in his statement of the law. The mere fact that it had been reported before could not justify him in repeating imputations made at a meeting. I

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think that in itself would not be sufficient, and I think his letter is not a sufficient justification for what was done supposing the correspondent's letter to be construed in the manner suggested by the Plaintiffs. I do not think that Mr. *Lovell* after this is likely to put letters in his paper without exercising more care than he has done. I think it would be dangerous to grant an injunction against such letters, because it would be difficult to frame any injunction which would express the object of the Court so as to avoid prejudicing the question at the trial, and for these reasons I do not think it right to grant any injunction; but, on the other hand, feeling that the Plaintiffs have had some provocation, and that that provocation might have been avoided if Mr. *Lovell* had taken the course which I think he ought to have pursued, I shall make the costs of the motion costs in the action.

H. L. F.

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The company appealed, and the appeal was heard on the 16th and 23rd of November, 1887.

R. Neville, and *Dunham*, for the appeal:—

The letters of the 21st and 24th of October contained distinctly libellous statements. The allegation that a requisition for a meeting to wind up the company was unanimously signed is admitted to be untrue, and is most prejudicial to the company, and the letters insinuate that after the disappearance of Messrs. *Cullen* and *Wrigley* the company cannot manage its affairs. They also allege the company to be insolvent, which is wholly untrue. These statements if allowed to be made may ruin this young company. The editor's justification of the first letter is a claim of right to issue letters of a like character and amounts to a threat and intention to repeat the libels. The principles on which the Court acts in these cases are discussed in *Quartz Hill Consolidated Gold Mining Company* v. *Beall* (1). A number of negative rules are laid down giving cases in which the Court will not grant an injunction, but no affirmative rule is given. It has been held that an injunction ought not to be granted unless (1) the statement is shewn to be untrue; (2) there is a threat to repeat it;

(1) 20 Ch. D. 501.

and (3) there is no privilege. We satisfy these three conditions. Interlocutory injunctions have been granted in *Thorley's Cattle Food Company* v. *Massam* (1); *Hill* v. *Hart Davies* (2); *Hermann Loog* v. *Bean* (3), and *Briton Life Association* v. *Roberts* (4). In *Saxby* v. *Easterbrook* (5) an injunction was granted at the trial. *Armstrong* v. *Armit* (6), relied on below, is no authority against us, for the statement there was privileged, and there was no sufficient evidence that it was untrue. We contend that whatever would be a libel on an individual trader is a libel on a trading company and ought equally to be restrained.

[LOPES, L.J.:—In *Mulkern* v. *Ward* (7) Vice-Chancellor *Wickens* lays stress on the absence of actual malice.]

If there is no privilege, malice must be inferred from a false statement, and the proprietor of a newspaper is in no better position in this than any one else: *Marks* v. *Conservative Newspaper Company* (8).

[COTTON, L.J.:—I feel some doubt as to that ruling. A newspaper stands in a peculiar position towards the public, it being for the general good that subjects of public interest should be discussed in the newspapers.]

We admit that, as was said in *Coulson* v. *Coulson* (9), the jurisdiction is to be exercised with great caution, but we contend that it ought to be exercised in our favour here. There is no sufficient remedy but an injunction, for if these libels are allowed to go on they may ruin this young company. On the balance of convenience and inconvenience the injunction ought to be granted, for it cannot hurt the Defendants. The statements are clearly defamatory, and there is no defence set up except privilege.

[COTTON, L.J.:—You are asking us to restrain future libels, not merely to restrain the publication of a particular document. How is an injunction to be framed so as not to include something which might turn out not to be libellous?]

(1) 14 Ch. D. 763.
(2) 21 Ch. D. 798.
(3) 26 Ch. D. 306.
(4) 2 Times L. R. 319.
(5) 3 C. P. D. 339.
(6) 2 Times L. R. 887.
(7) Law Rep. 13 Eq. 619.
(8) 3 Times L. R. 244.
(9) 3 Times L. R. 846.

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The Court went beyond the actual circular in *Thorley's Cattle Food Company* v. *Massam* (1). If the publisher does not give up the name of the writer of a libel he stands in the shoes of the writer: *Hibbins* v. *Lee* (2). A publication to other than shareholders is not privileged: *Parsons* v. *Surgey* (3); *Davis* v. *Cutbush* (4); *Davison* v. *Duncan* (5).

Warmington, Q.C., and *Chadwyck Healey*, for the Respondents, were not called upon.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Kekewich*, who declined to grant an interlocutory injunction in an action brought against the proprietors of a newspaper in respect of three alleged libels—the first being a report of a meeting of the shareholders of the Plaintiff company published in the newspaper of the Defendants, and the others being two letters published in the same newspaper. The injunction sought for is not to restrain the future publication of these alleged libels, and for this reason—that there is no probability of any republication in that paper of the report of the meeting, and no probability that those letters will be again sent to the paper. It is not necessary to decide the question, how far, if those who regulate the affairs of a company invite the reporters of a newspaper to come to a private meeting, the company can afterwards sue the newspaper for publishing a full report of that meeting because statements made at the meeting were libellous. I think that would require some consideration. Nor is it necessary for us to consider how far the proprietors of the newspaper would be liable for inserting letters commenting on what was said at the meeting of which they have published a report. We have not to decide these questions, because there is no probability that the report of the meeting or these letters will be repeated, and whether damages can be recovered for them is a question to be decided only at the trial of the action. There is also another question to be

(1) 14 Ch. D. 763.
(2) 4 F. & F. 243; 11 L. T. (N.S.) 541.
(3) 4 F. & F. 247, 249.
(4) 1 F. & F. 487.
(5) 7 E. & B. 229.

considered at the trial—whether a company issuing a prospectus asking shareholders to join it, does not to a certain extent invite public comment on its constitution, its capital, and its prospects. The injunction now asked for is not an injunction to restrain the republication of the report or of the letters, but it is to restrain the Defendants from publishing "any articles, letters from correspondents, or any other matter containing assertions, imputations, or suggestions that the Plaintiff company is insolvent or incapable of carrying on its business with success, or that the shareholders did at the general meeting unanimously sign or propose a resolution to the effect that another general meeting of the company should be convened for the purpose of taking into consideration whether the company should be wound up." Now there is really no suggestion that the Defendants threaten or intend to republish the statement as to the unanimous resolution. Ought we then to grant an injunction with reference to the future publication in this paper of things of the nature here complained of? No doubt it may be very truly said, "I am not bound by the notice of motion; I am entitled to go for any injunction with regard to future publication that the Court may grant me." But I agree with Mr. Justice *Kekewich* that there would be the very greatest difficulty in laying down the terms in which we, in the present case, could grant an injunction. In *Coulson* v. *Coulson* (1), the Master of the Rolls said that to justify the Court in granting an interim injunction it must come to a decision on the question of libel or no libel before the jury decided whether it was a libel or not—that the jurisdiction therefore was of a delicate nature and ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where if the jury did not so find, the Court would set aside the verdict as unreasonable. That is what the Master of the Rolls said with reference to an existing document brought before the Court, and Lords Justices *Lindley* and *Lopes* concurred in that ruling. Now in the case of an existing document brought before the Court, the Court can judge of its character, but how can the Court judge whether documents which are not yet in existence will be libellous? In my opinion

(1) 3 Times L. R. 846.

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Cotton, L.J.

it would be very dangerous to grant an interlocutory injunction with reference to future publication unless we could lay down definitely some line which would include only the publication of what would necessarily be libellous. In my opinion it would be very unadvisable to grant any injunction which would restrain fair discussion in the newspapers of matters of importance like that of the probable success or failure of a public company. Of course if anything libellous is published in the newspaper there will be a right of action against the proprietors and they will be answerable; but I feel that there would be the greatest danger in granting an interlocutory injunction such as is now asked for. Several cases were cited in support of the case of the Appellants. That of *Hill* v. *Hart Davies* (1), before *Kay*, J., is the strongest. The defendant there was the parson of a parish, and published a circular containing statements with reference to a friendly society to the effect that it was insolvent, and that it would be dangerous to invest money in it. These statements were proved to be incorrect; and then with the document before the Court, proved to be incorrect, and defamatory and injurious to the plaintiff society, an interlocutory injunction was granted in reference to the document, Mr. Justice *Kay* adding, "or any other circular or letter containing false or inaccurate representations as to the credit or financial condition of the said society." Whether he was right or wrong in adding those words I give no opinion; but there was before the Court a document shewing the nature of the statements likely to be published by the defendant. The defendant, moreover, was not in the position of a newspaper. I think that a newspaper occupies a peculiar position, especially with regard to matters concerning the interest of those amongst whom the newspaper circulates, such as the discussion of the condition of a company like this. I do not say that any statements or letters printed in the Defendants' newspaper making reflections of the character indicated in the notice of motion will not be libellous; but I cannot say that the jury would necessarily find them to be libellous. As regards *Hermann Loog* v. *Bean* (2), the main ground for granting the injunction was one that does not exist in the present case. There the defendant had been in the

(1) 21 Ch. D. 798, 802. (2) 26 Ch. D. 306.

employment of the plaintiffs' firm and was restrained from making to their customers slanderous statements as to the plaintiff's business, in making which he was guilty of a breach of duty to his former employers. The Court abstained from giving any opinion whether the defendant could be restrained from making the statement to any persons other than the plaintiff's customers. In no case do I find an injunction granted such as is asked for here, an injunction as regards future publication of statements coming under such an indefinite description. Supposing we were to grant the injunction against "libellous" letters, then it would have to be decided on motion to commit whether what was published was libellous or not; and that would be a most inconvenient course to be adopted. In my opinion, therefore, the appeal must fail.

LOPES, L.J.:—

This is an application for an interlocutory injunction to restrain libellous publications. It is clear that since the *Judicature Act* the Court has power to restrain the publication of libellous or slanderous matter, if it is immediately calculated to injure the person or trade of any one against whom it is directed, but whether the jurisdiction should be exercised or not is a matter for the discretion of the Court. We have to deal in the present case with the report and two letters, one published on the 21st, and the other on the 24th of October. With regard to the report, it is clear that the question whether it is privileged must be left to be decided at the trial, and if the publication should be held to be privileged it will be necessary for the Plaintiffs to establish that there has been actual malice, which is not suggested to exist in this case. The reporters at the meeting in question were present, with the knowledge of the Plaintiffs, if not with their sanction. Are the reporters in such cases to give an imperfect report, omitting all that is detrimental to the company, and stating only what is in its favour? I do not hesitate to say that anything more undesirable or more calculated to mislead and bring about disastrous results can scarcely be imagined. Passing from the report, I come to the letters, and after what has been said by Lord Justice *Cotton*, with which I agree, I have little to add. Speaking for

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myself, it does not appear to me to be so perfectly clear, taking all the circumstances into consideration, that the jury will come to the conclusion that the letters which have been published were libels, as to justify the Court in granting an interlocutory injunction against republishing them; and as regards future letters of the description mentioned in the notice of motion, it clearly is not so apparent that a jury will find them libels as to justify the Court in interfering in the way asked. It would be most inconvenient to have the question of libel or no libel tried by a Judge on motion to commit instead of being tried by a jury. I agree with all that was said by the Master of the Rolls in *Coulson* v. *Coulson* (1), and in the present case my opinion is that the Judge below was right, and that the appeal must be dismissed.

Solicitors for Plaintiffs: *Pritchard & Marshall*, agents for *G. R. Rogerson & Co., Liverpool.*

Solicitors for Defendants: *Wynne, Holme, & Wynne*, agents for *Mason & Grierson, Liverpool.*

H. C. J.

C. A. 1887 *Nov.* 30; *Dec.* 1.

FENNESSY *v.* CLARK.

[1887 F. 63.]

Practice—Discovery.

In an action to restrain the sale of goods under an alleged infringement of Plaintiff's trade-mark and claiming damages for false representations by Defendant that his goods were goods of Plaintiff's manufacture, or in the alternative an account of profits, it was ordered that the questions of fact arising in the action should be tried by a special jury before a Judge:—

Held, that Plaintiff, who had not made his election between damages and profits, was not entitled, before he had succeeded in establishing his title to relief by verdict of the jury upon the questions of fact in the action, to discovery as to the sales effected by the Defendant and production of his books for that purpose.

IN this action the Plaintiff claimed an injunction to restrain the Defendant from selling a polish for boot and shoe dressing

(1) 3 Times L. R. 846.

in boxes closely resembling and labelled in colourable imitation of Plaintiff's boxes and registered label for "*Brown's Satin Polish*"; delivery up by Defendant of all labels in use imitating Plaintiff's label; £1000 damages for false representation by Defendant that the polish made and sold by him was the polish made by the Plaintiff, or in the alternative an account of all sales of goods by Defendant with labels so calculated to deceive and of all profits thereon.

On the 7th of June, 1887, an order was made in Chambers "that the questions of fact arising in this action be tried by a special jury before a Judge at the sittings in *Middlesex*."

On the 29th of October a summons was taken out by the Plaintiff for a further and better affidavit by the Defendant in answer to interrogatories directed to the number of sales effected by him of the self-polishing preparation, and to a further and better affidavit of documents (including the books in which the business transactions relating to the polishing preparation complained of in the action were entered).

Mr. Justice *Kay* having dismissed the summons with costs, on the ground that it was premature, the Plaintiff now appealed from such dismissal.

Moulton, Q.C., and *R. W. Wallace*, in support of the appeal:—

The Defendant refuses to produce his books and to answer questions as to his business. An order has been made for trial of the issue whether the Defendant has sold his goods under fraudulent labels, and the Plaintiff cannot tell what damage he has thereby sustained without an inspection of the Defendant's books, which are most important evidence upon this question.

[COTTON, L.J.:—Inspection of the Defendant's books might be material if you were asking for an account of the profits made by him, but how can the books give any proof of the damage done to you by his sales?]

F. Vaughan Hawkins, for the Defendant, *contrà*:—

Until the Plaintiff's title to relief and the Defendant's liability, on the grounds alleged in the statement of claim, have been established, the discovery here asked for as to the sales

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effected by the Defendant, and production of his books, is premature, must impose trouble and annoyance upon the Defendant to no purpose if the verdict be in his favour on the question of liability, and ought not to be granted: *Elkin* v. *Clarke* (1). Moreover, the question of damages is not a question of fact arising in the action within the meaning of the order of the 7th of June, 1887, which is directed to questions upon which the Plaintiff's title to relief depends. This distinction between questions of fact and questions as to the amount of damages is taken in 21 & 22 Vict. c. 27 (*Cairns' Act*), ss. 4, 5, and also in Cons. Ord. of the Court of Chancery, Order XLI., rule 26, and was expressly recognised in *Elkin* v. *Clarke*. Even if the question of damages would be a question for trial under the order of the 7th of June, the rule against giving discovery with a view to the amount of damages to be possibly recovered, before any liability on the part of the Defendant to pay damages has been determined, must prevail.

Moulton, in reply:—

In *Fennessy* v. *Rabbits* (2) (an action by the present Plaintiff against other infringers) it was held that the question of damages ought to be tried by a jury. In *Elkin* v. *Clarke* it was thought more convenient that there should be a reference as to damages and to that the Defendant consented. It might have been better if the action had been transferred altogether to the Queen's Bench Division, when the damages would have been found by the jury if the verdict was for the Plaintiff, but we submit that damages are included in the term "questions of fact arising in the action," and that Order XXXVI., rule 4, was not intended to exclude the question of damages. We offer to waive the claim for an account of profits.

COTTON, L.J.:—

The discovery asked for relates to what will be the amount of damages to which the Plaintiff would be entitled if he succeeds in establishing that the Defendant has been so acting as to entitle him (the Plaintiff) to damages or to an account of profits. The order

(1) 21 W. R. 447. (2) 56 L. T. (N.S.) 138.

of June last was not for trial of the action, but for trial of the questions of fact arising in the action. Now, I do not say that the damage sustained by the Plaintiff is not a question of fact, but is it a question of fact within the meaning of that order? At the time when the order was made the Plaintiff had not elected to waive his account of profits. Would it then be right to allow the Plaintiff to get a jury to determine what damages he was entitled to before he has made his election between damages and profits? Should the jury award him a large sum for damages he would probably accept it, but if they gave him a small sum only, then he might say, "No, I would rather have an account of profits, as I see by the Defendant's books that he has made a much larger sum."

By "questions of fact" I think that the order means questions of fact on which the Plaintiff's title to relief depends. In my opinion the decision of Mr. Justice *Kay* is right, and the Plaintiff's application for discovery and inspection of the Defendant's books is premature. It is not necessary to refer to the authorities. The Court is always unwilling before the right to relief is established to make an order for discovery which may be injurious to the defendant, and will only be useful to the plaintiff if he succeeds in establishing his title to relief.

LOPES, L.J., concurred.

Appeal dismissed with costs.

Solicitors: *Burn & Berridge; H. A. Stephens.*

F. G. A. W.

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Dec. 1.

WALKER *v.* DODDS.

[1887 W. 5427.]

Practice—Chancery of Lancaster Rules, 1884, *Order* II., *r.* 4; *Order* XII., *rr.* 1, 7 —*Service of Writ out of Jurisdiction*—17 & 18 *Vict. c.* 82, *s.* 8 [*Revised Ed. Statutes, vol. xii. p.* 95].

Order II., r. 4, of the Chancery of *Lancaster* Rules, which provides that "no writ of summons for service out of the jurisdiction . . . . shall be issued without the leave of the Court or Vice-Chancellor," applies to all writs for service out of the jurisdiction of the Palatine Court, whether the person to be served is or is not within the jurisdiction of the High Court.

Accordingly leave of the Vice-Chancellor, or Court, of the County Palatine for issue of the writ out of the jurisdiction must be obtained before making application to the Court of Appeal under 17 & 18 Vict. c. 82, s. 8, for leave to serve the writ upon a person out of the jurisdiction of the Palatine Court, but within the jurisdiction of the High Court.

APPLICATION to discharge, on the ground of irregularity, an order made by this Court on the 3rd of November, 1887, on an *ex parte* application for leave to serve a writ issued out of the Palatine Court of *Lancaster* upon a Defendant out of the jurisdiction of that Court.

The action was brought against two Defendants, one of whom was within the jurisdiction of the Palatine Court, the other within the jurisdiction of the High Court, but not within that of the Palatine Court. The writ was issued out of the Palatine Court on the 11th of August, 1887, and was served upon the Defendant within the jurisdiction of that Court, who had appeared.

On the 3rd of November, 1887, upon an *ex parte* application by the Plaintiffs, an order was made by the Court of Appeal, giving them liberty to serve a copy of the writ out of the jurisdiction of the Palatine Court upon the other Defendant, *H. N. Dodds*. Leave had not been obtained from the Vice-Chancellor of the Palatine Court for issue of the writ for service out of the jurisdiction of that Court as required by the Chancery of *Lancaster* Rules, Order II., rule 4.

The Defendant now moved that the order of the 3rd of November, 1887, might be discharged as irregular (1).

O. Leigh Clare, in support of the motion :—

According to the practice of the Palatine Court, application to the Vice-Chancellor for leave to issue the writ for service out of the jurisdiction must be made before applying to the Court of Appeal under 17 & 18 Vict. c. 82, s. 8, for service on a party within the jurisdiction of the High Court, and this practice has been recognised by the Court of Appeal: *Anon.* (2)

In this case the leave of the Vice-Chancellor has not been obtained, and therefore the order of the 3rd of November was irregularly obtained, and ought to be discharged.

[He also referred to *Sedgwick* v. *Yedras Mining Company* (3).]

Maberly, for the Plaintiff, *contrà* :—

The order of the 3rd of November, 1887, complies with the provisions of 17 & 18 Vict. c. 82, s. 8. Order II., rule 4, and Order XII., rule 1, which must be read together, apply only to service out of the jurisdiction both of the Palatine Court and of the High Court.

(1) By the *Court of Chancery of Lancaster Act*, 1854 (17 & 18 Vict. c. 82), s. 8: "In all cases in which any person who may be a necessary or proper party to any suit or other matter in the Court of Chancery of the said County Palatine shall not be subject to the jurisdiction of the said Court, it shall be lawful for the Court of Appeal on the application of the plaintiff in such suit . . . . either to order and direct that the said suit or other matter be transferred to the High Court of Chancery, or otherwise to order and direct that such service as may be proper be effected upon such person out of the jurisdiction of the said Court of the said County Palatine, and such application shall be made either *ex parte* or upon such notice as the said Court of Appeal shall think fit."

By the Chancery of *Lancaster* Rules, 1884, Order II., r. 4: "No writ of summons for service out of the jurisdiction, or of which notice is to be given out of the jurisdiction, shall be issued without the leave of the Court or Vice-Chancellor."

Order XII., r. 1: "Service out of the jurisdiction of the Court, and not within the jurisdiction of the High Court of Justice, of a writ of summons, or notice of a writ of summons, may be allowed by the Court, or Vice-Chancellor, whenever . . . . [in certain specified cases]."

Rule 7: "The practice as to service out of the jurisdiction of the Court, and within the jurisdiction of the High Court of Justice, is not hereby affected, and shall be in force as to proceedings under these rules."

(2) 23 Sol. J. 404.

(3) 35 W. R. 780.

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COTTON, L.J. (after stating the case, continued):—

The application is made on the ground of the irregularity of the order for service out of the jurisdiction of the Palatine Court, without the leave of the Vice-Chancellor having been first obtained for such service of a writ which had been issued out of that Court. Reliance was placed on Order II., rule 4, of the County Palatine Rules [to which his Lordship referred]. Then Order XII. deals with service out of the jurisdiction both of the Palatine Court and of the High Court; and it was contended on behalf of the Plaintiff that Order II., rule 4, must be read in conjunction with Order XII., and that the provision only applies to service out of the jurisdiction of both Courts. That, however, would, I think, be giving a wrong construction to Order XII., and in my opinion Order II., rule 4, applies to all writs for service out of the jurisdiction of the Palatine Court, whether the person to be served is or is not within the jurisdiction of the High Court. It is true that Order XII., rule 7, provides that "The practice as to service out of the jurisdiction of the Court and within the jurisdiction of the High Court of Justice, is not hereby affected, and shall be in force as to proceedings under these rules," and it is said that rule 4 is not intended to interfere with service of writs out of the jurisdiction of the Palatine Court but within the jurisdiction of the High Court. I do not think that is so, but that it only means that nothing in Order XII. shall interfere with the existing practice as to service out of the jurisdiction of the Palatine Court, and within the jurisdiction of the High Court—not that the other orders shall not do so. In my opinion the writ for service in this case was not properly issued. The case referred to—*Anon.* (1)—shews that we shall not be interfering with the practice of the Palatine Court by coming to the conclusion at which we have arrived; for in that case *Jessel*, M.R., took the same view of the practice that we have done. We do not base our opinion on that case, but we were unwilling to act without knowing what the practice had been. I will only add that counsel applying to the Court of Appeal under the *Court of Chancery of Lancaster Act* (17 & 18 Vict. c. 82), s. 8, for leave to serve the writ out of the jurisdic-

(1) 23 Sol. J. 404.

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tion, ought to inform the Court whether leave for the issue of the writ out of the jurisdiction has or has not been obtained. In my opinion the order for service out of the jurisdiction was wrong, and must be discharged.

FRY, L.J. :—

I am of the same opinion.

LOPES, L.J. :—

I also am of the same opinion. The case referred to is in point.

Application allowed, and order discharged.

Solicitors: *Price & Woodcock, Manchester; Clarke, Woodcock, & Ryland*, agents for *J. G. Openshaw, Bury.*

F. G. A. W.

C. A. 1887 KAY, J. *Oct.* 28; *Nov.* 5, 9. C. A. *Dec.* 7.

In re ADDLESTONE LINOLEUM COMPANY.

Limited Company—Fully paid-up Shares—Issue at a Discount—Winding-up—Contributory—Shareholder-Creditor—Proof—Damages—Breach of Contract—Companies Act, 1862, *s.* 38, *sub-s.* 7 [*Revised Ed. Statutes, vol. xiv., p.* 211]—*Companies Act*, 1867, *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628].

A limited company issued part of its capital in £10 preference shares at par, every present shareholder to be entitled to one preference share at 25 per cent. discount for each ordinary share held by him. Some of the shareholders took these preference shares, paid the £7 10*s.* per share, and had certificates given them stating them to be holders of shares fully paid up. No contract was registered under sect. 25 of the *Companies Act*, 1867. The company having been ordered to be wound up, the preference shareholders who had taken their shares at a discount were placed on the list of contributories, and calls for the unpaid £2 10*s.* per share were made on them and paid. Some of them then applied for leave to prove in the winding-up "in damages for breach of contract or otherwise in respect of the issue of the preference shares":—

Held, by *Kay*, J., that if there were any claim for damages the case fell within sect. 38, sub-sect. 7, of the *Companies Act*, 1862, but that the Applicants could not have maintained an action for damages against the company if it had not been wound up, and could not prove for damages in the winding-up, either against other creditors, or shareholders, or the company :—

Held, on appeal, that if the contract between the company and the share-

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holders was to be treated as a contract to issue fully paid-up shares, the shareholders might on finding out that the shares were not in point of law fully paid up, have rescinded the contract to take them, but as after an order to wind up there could be no rescission, the shareholders had no remedy, it being settled by *Houldsworth* v. *City of Glasgow Bank* (1) that a shareholder retaining his shares cannot bring an action against the company for misrepresentations by which he was induced to take them, and the Court being of opinion that no substantial distinction could be drawn for this purpose between misrepresentation and a breach of a contract that the shares should be fully paid-up shares.

Mudford's Claim (2) and *Ex parte Appleyard* (3) questioned.

Semble, that, if the contract was to issue shares at a discount, the allottees took the shares subject to a liability to pay their nominal amount in full, and could not be exonerated from this liability even by a registered contract.

In re Ince Hall Rolling Mills Company (4) and *In re Plaskynaston Tube Company* (5) disapproved.

THE *Addlestone Linoleum Company, Limited,* was incorporated in 1877 with a nominal capital of £25,000 in 2500 shares of £10 each. Article 15 of the articles of association empowered the directors from time to time "to issue such portion of the capital as shall not have been subscribed for and allotted, with such special privileges with reference to preferential, guaranteed, fixed, fluctuating, redeemable, or other dividend or interest, or otherwise, as shall from time to time be determined by a general meeting."

On the 13th of January, 1881, only about one third of the shares having been subscribed for, the directors issued a circular embodying the material parts of the report which they were about to submit to the annual meeting. By their report, after stating that the working capital at their command was insufficient, they said that they recommended "An issue of 750 £5 per cent. preference shares of £10 each at par, every present shareholder to be entitled to one preference share at 25 per cent. discount for each ordinary share now held. By this means every holder of a £10 share will be entitled on payment of £7 10*s.* to a preference share of £10, or if he does not care to pay the £7 10*s.*, and take up the preference share, he can sell or otherwise deal with his

(1) 5 App. Cas. 317.
(2) 14 Ch. D. 634.
(3) 18 Ch. D. 587.
(4) 23 Ch. D. 545, n.
(5) 23 Ch. D. 542.

right on evidently advantageous terms. As it is absolutely necessary for the successful carrying on of the business of the company that a liberal response be made by the shareholders to the scheme proposed by the directors, the board will not proceed to allot any preference shares unless an aggregate amount of not less than £3000 be applied for. For the convenience of shareholders the directors will receive the amounts as follows: £2 10*s.* per share on allotment, £2 10*s.* per share on the 1st of April, 1881, £2 10*s.* per share on the 1st of July, 1881."

The circular gave a form of application by shareholders for preference shares: "I approve of the issue of preference stock on the terms of your annual report, and request you to allot me —— of the said shares of £10 each, at £7 10*s.* per share." The directors went on to request that the form might be filled up and returned by the 20th, when the time of the annual meeting would be fixed.

The general annual meeting was held on the 8th of February, 1881, and passed unanimously a resolution "That the directors' report and balance sheet be adopted, and the issue of preference shares in accordance therewith be approved."

The preference shares thus to be issued were not issued as additional capital, but as part of the original capital of £25,000.

Various shareholders of the company, including the Appellants, applied for preference shares according to the above form of application, and had shares allotted to them. The form of certificate was as follows:—

"The *Addlestone Linoleum Company, Limited.*

"Capital £25,000, in 2500 shares.

"Whereof 750 are preference shares issued in pursuance of a resolution passed at a general meeting of the company held on the 8th day of February, 1881, and of the provisions of the articles of association of the above-named company.

"This is to certify that —— of —— is the holder of —— preference shares of £10 fully paid-up, numbered —— to —— in the above company, being part of the above-mentioned 750 preference shares of £10 each, and that the said —— and the holders for the time being of the said preference shares are

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entitled to be paid out of the net annual profits of the said company, in priority to any payment to the holders of ordinary shares in the said company, interest at the rate of £5 per cent. per annum on the amount for the time being paid up in respect of the said preference shares . . . ."

The Appellants paid the £7 10*s.* per share on the preference shares allotted to them.

On the 9th of May, 1885, an order was made to wind up the company. On the 28th of March, 1887, the preference shareholders were included in the list of contributories, and on the 20th of May, 1887, an order was made on them for a call of £2 10*s.* per share. The Appellants paid this call on their shares.

The Appellants applied by summons for leave to tender proofs in the winding-up against the company in damages for breach of contract or otherwise, in relation to the issue of the preference shares in respect of which they were placed on the list of contributories.

The summons was adjourned into Court, and heard by Mr. Justice *Kay*, on the 29th of October, and the 5th of November, 1887.

Farwell, for the Applicants:—

The company having failed to give us what we contracted to buy, namely, fully paid-up shares, we are entitled to prove in the winding-up for damages: *Mudford's Claim* (1); *Ex parte Appleyard* (2); the measure of the damages being the £2 10*s.* we have now been called upon to pay.

Marten, Q.C., and *F. B. Palmer*, for the official liquidator:—

The cases cited are distinguishable from the present in that there were good independent contracts with the shareholder quite outside his contract to take shares, whereas here there was nothing but the ordinary application for shares followed by allotment. Those authorities have not been generally accepted as sound law: *Buckley* on the Companies Acts (3); and it is remarkable that in neither of the cases was the question considered whether, having

(1) 14 Ch. D. 634. (2) 18 Ch. D. 587.

(3) 4th Ed. p. 113.

regard to the terms of sect. 38, sub-sect. 7, of the *Companies Act*, 1862, a member of a limited company could claim to be a creditor under a contract to issue fully paid-up shares, and as such to put himself in competition with outside creditors. The point seems to have been suggested in the argument in *Ex parte Appleyard* (1), but it was not dealt with in the judgment. We submit that the present claim is in direct contravention of that section, for the general words "or otherwise" are sufficient to cover a claim of this kind. It has been held that a director's unpaid fees being due to him as a member must, under that section, be postponed to outside creditors: *Ex parte Cannon* (2). The claim here is made because the shares were allotted. The reasons given for the decision in *Mudford's Claim* (3) and *Ex parte Appleyard* are totally inconsistent with the principles laid down in the House of Lords in *Houldsworth* v. *City of Glasgow Bank* (4)—principles which are applicable to such a case as this: and accordingly the position of the claimants is that they have contracted that the capital subscribed by them shall be applied in payment of the company's debts, and their own claims are not within the contract. The contract to take shares differs essentially from a contract to buy goods; unless it can be rescinded there can be no proof for damages. Moreover, the claimants have held themselves out to the world as members of the company: *Oakes* v. *Turquand* (5); and they cannot now claim, in competition with the creditors, part of the fund which those creditors were invited to look to: *Trevor* v. *Whitworth* (6). The provisions of the *Companies Act* should be read into the articles of association of the company: *Bannatyne* v. *Direct Spanish Telegraph Company* (7).

Farwell, in reply:—

The case is the same as if the company had contracted to sell free from incumbrances, while they had in fact failed to perform the contract by selling subject to a charge. It is true that rescission is now impossible; but the purchaser of a defective article

(1) 18 Ch. D. 587.
(2) 30 Ch. D. 629.
(3) 14 Ch. D. 634.
(4) 5 App. Cas. 317.
(5) Law Rep. 2 H. L. 325.
(6) 12 App. Cas. 409.
(7) 34 Ch. D. 287.

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does not by retaining it lose his right to sue for damages in respect of it: *In re Cape Breton Company* (1).

[On the question of the right of the purchaser of a chattel to rescind his contract on the ground of difference in the thing bargained for and obtained, KAY, J., referred to *Benjamin* on Sales (2); *Kennedy* v. *Panama Mail Company* (3), and *Gompertz* v. *Bartlett* (4).]

Our right to claim damages in the winding-up in respect of these shares is not affected by sect. 38, sub-sect. 7, of the Act of 1862, for the damages in such a case as this are not a "sum due to" the applicant "in his character of a member, by way of dividends, profits, or otherwise," but a sum due to him by reason of a breach of contract entered into by the company with him.

If a tramway company enters into a contract with one of their shareholders to carry him as a passenger, and they make default, is his remedy against the company to be postponed to that of other creditors? The contract in the present case stands on the same footing; it is only an accident that it is in respect of shares.

[KAY, J. :—In *Houldsworth* v. *City of Glasgow Bank* (5) the House of Lords has decided that a member of a company in liquidation cannot maintain, in competition with other creditors, a claim for damages for fraudulent misrepresentation inducing him to take shares.]

That was not a decision under sect. 38, sub-sect. 7, of the *Companies Act*, 1862, upon which the present case turns, and that case is distinguished by Vice-Chancellor *Hall* in *Ex parte Appleyard* (6) expressly on the ground that it was a case not of contract but of fraudulent misrepresentation.

Ex parte Cannon (7) was a case of directors' fees only, and not of contract. In *Grissell's Case* (8) it was held that a shareholder who was also a creditor of the company under a contract was

(1) 29 Ch. D. 795.
(2) 2nd Ed. pp. 328, 329, 493, 494; 3rd Ed. pp. 377, 600, 601.
(3) Law Rep. 2 Q. B. 580.
(4) 2 E. & B. 849.
(5) 5 App. Cas. 317.
(6) 18 Ch. D. 587.
(7) 30 Ch. D. 629.
(8) Law Rep. 1 Ch. 528.

entitled, after payment of his calls, to rank *pari passu* with the other creditors.

[He also referred to *Turner* v. *Browne* (1).]

1887. Nov. 9. KAY, J.:—

In the year 1881 this company issued to the present Applicants fully paid-up preference shares of the nominal value of £10 each, in consideration of the payment of £7 10*s.* per share. No contract was filed with the Registrar of Joint Stock Companies as required by sect. 25 of the *Companies Act*, 1867. On the 9th of May, 1885, an order was made to wind up the company, and the Applicants have been placed on the list of contributories, and calls have been made on them for the amount of £2 10*s.* unpaid on each share.

It is not denied that the Applicants are liable to these calls. They have taken out the present summons asking for leave to prove against the company in damages "for breach of contract, or otherwise," in relation to the issue of these shares, suggesting that the measure of such damages would be the £2 10*s.* per share which they have been so made to pay.

Of course, it is too late to assert any remedy by way of rescission of the contract; but I will assume for the present that the Applicants might elect to retain the shares and sue the company for damages. The question, then, is whether they can prove for such damages in competition with any other creditor not being a member of the company; or whether the case comes within sect. 38, sub-sect. 7, of the *Companies Act*, 1862, which is in these terms:—"No sum due to any member of a company, in his character of a member, by way of dividends, profits, or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between himself and any other creditor not being a member of the company; but any such sum may be taken into account, for the purposes of the final adjustment of the rights of the contributories amongst themselves."

Now, unquestionably the Applicants—retaining these shares and claiming damages because the shares are not exactly what

(1) 3 C. B. 157.

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they were represented to be—are making such claims in the character of members of the company, and the only question is whether such claims are for sums due "by way of dividends, profits, or otherwise." To determine that it is necessary to consider the scope and intent of this provision in the statute. The obvious analogy is the case of a partner attempting to prove in bankruptcy in competition with the creditors of the firm. But whether this section is intended to have entirely the same effect or not, it is quite clear from the language of it that a debt due to a member in that character, such as for dividends, directors' fees, or the like, could not be so proved.

Now, is the mischief against which it is intended to provide the same in the case before me? Practically, what these Applicants are seeking to recover by their proof is a dividend in respect of the £2 10*s.* per share which they have been compelled to pay in the winding-up. But as shareholders they have contracted that they will pay this money, and that it shall be first applied in payment of the creditors whose debts are not due to them as members of the company—that is, they are practically admitting their liability to pay the £2 10*s.* per share to such other creditors and yet seeking to get part of it back out of the pockets of those very creditors themselves. I confess it seems to me that the money so claimed is not only claimed in the character of members but that the claim is just as unreasonable as if it were a claim of dividends or profits, and that, accordingly, it comes within the words "or otherwise," which I have read from sect. 38.

So much for the principle. The authorities are these. In *Mudford's Claim* (1) Vice-Chancellor *Hall* decided that similar shares taken in satisfaction by a creditor of the company gave him a right of proof for the amount of the calls paid by reason of the company's breach of contract in not giving him paid-up shares. The question whether he could prove in competition with other creditors does not seem to have been argued. In *Houldsworth* v. *City of Glasgow Bank* (2) it was held that fraudulent misrepresentations of the directors inducing the plaintiff to take shares might give him a right to rescind the contract, but gave him no right whatever to hold the shares and prove for damages

(1) 14 Ch. D. 634. (2) 5 App. Cas. 317.

against the company. That case was called to the attention of Vice-Chancellor *Hall* in *Ex parte Appleyard* (1), in which the circumstances were the same as in *Mudford's Claim* (2), and he distinguished it as being a case of contract, and followed his own previous decision, by holding that in the case before him there was a right of proof; but he does not say a word upon the point, which seems to have been suggested in the argument, that such proof should not be in competition with other creditors. He refers to certain *dicta* in *White's Case* (3), where, the contract being for payment of a creditor of the company in fully paid-up shares, it was held that the creditor had no money demand against the company, and that, the shares not having been in fact fully paid up, he was bound to pay calls on them without prejudice to the question whether he was entitled to damages against the company. But there again I do not find any suggestion that he would be entitled to prove for such damages in competition with other creditors.

In the two cases before Vice-Chancellor *Hall* the shares were given in satisfaction of *bonâ fide* claims against the company, so that if they were not fully paid up it might be said the holders of them should be remitted to their original position of creditors. I do not know how far this may have influenced the decisions. In the present case there is no such fact. The Applicants, not being at the time creditors of the company, simply paid £7 10*s.* for £10 shares. No consideration was given for the remission of the £2 10*s.* per share, which was not paid. I therefore hold that if these shareholders can claim damages at all, that claim cannot be made in competition with creditors in the winding-up whose debts are not due to them in the character of shareholders.

But is it the law that this claim for damages could be supported if the company were not being wound up? If it could, the consequence would be that the company would receive and must then return, in the shape of damages, £2 10*s.* a share in respect of these so-called paid-up shares. That would practically render nugatory sect. 25 of the *Companies Act*, 1867. A solvent company might issue shares, nominally paid up, at a discount,

(1) 18 Ch. D. 587. (2) 14 Ch. D. 634.
(3) 12 Ch. D. 511.

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and omit to register the contract, and take with one hand and repay with the other the discount on each share, and if the Applicants' argument is sound no one could interfere. But suppose the company insolvent, and that the other shares were *bonâ fide* paid up, and that the creditors who had a right to treat these shares as not paid up had no other property to look to except the unpaid calls upon them, could it be said that the case was not touched by the statute?

The decisions in favour of such a claim as that to which I have referred proceed upon the ground of a supposed breach of contract by the company. But if the shareholder elects to keep the shares, how can there be any such breach of contract? An action against a solvent company would proceed upon the election of the shareholder to retain his shares. Would not the answer to such an action be—"Your only remedy is rescission; you cannot approbate and reprobate; you cannot be heard to say, 'I am a shareholder, who has contracted to pay £2 10*s.* a share when called on,'—which is the effect of approbating the contract,—'but I ask to recover that amount from the company as damages because I did not so contract,'—that would be reprobating the contract."

The truth is—as was said by Earl *Cairns* in *Houldsworth* v. *City of Glasgow Bank* (1)—that a share taken from a company is not like an ordinary chattel, in respect of which the purchaser may have a choice of remedies. By accepting such a share the allottee merges himself in a society and contracts to pay calls when made. Much of the reasoning of the learned Lords in that case applies very closely to this. Here, as there, the shareholder "is making a claim which is inconsistent with the contract into which he has entered, and by which he wishes to abide" (2). The loss against which he seeks to be indemnified is, in effect, what he has contracted to contribute to the debts and liabilities of the company. He seeks to throw this amount on the other shareholders. He is "trying to reconcile two inconsistent positions, namely, that of shareholder and that of creditor of the whole body of shareholders including himself" (3). My opinion

(1) 5 App. Cas. 324. (2) 5 App. Cas. 325.
(3) 5 App. Cas. 333.

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is that he could not maintain an action for such damages against the company if it were not being wound up, and that he cannot maintain such a claim as this in the winding-up, either against other creditors, or shareholders, or the company.

I assume throughout that the company had power to issue fully paid-up shares at a discount if they had duly registered an agreement with each allottee of such shares.

The application must be refused with costs.

G I. F. C.

C. A.

An appeal from this decision was heard on the 7th of December, 1887.

Farwell, for the Appellants:—

There was a contract by the company with the allottees to issue them fully paid-up shares. This involves a contract by the company to do what is necessary for that purpose.

[COTTON, L.J.:—Where is the contract to give you fully paid-up shares?]

The form of the certificate coupled with the previous papers shews such a contract. This contract has been broken, and I submit that if there were no winding-up this action could be maintained against the company. Mr. Justice *Kay* thought not, but such a rule would lead to gross injustice. Suppose a man sold his property to a company for fully paid-up shares, and the contract was not registered. If he could not prove, he would have parted with the property for nothing, would have to pay the value of it in calls, and would have no remedy over. In *Mudford's Claim* (1) a person who had been paid a debt in fully paid-up shares, but owing to non-registration became a contributory, was allowed to prove. In *Houldsworth* v. *City of Glasgow Bank* (2) it was held that a shareholder cannot while he remains such bring an action for deceit against the company in respect of misrepresentations by which they induced him to take his shares, but there is nothing in this to apply to an action for breach of contract. This distinction is taken in *Ex parte Appleyard* (3), in which *Mudford's Claim* was followed. There is

(1) 14 Ch. D. 634. (2) 5 App. Cas. 317.

(3) 18 Ch. D. 587.

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nothing to prevent a shareholder from being a creditor of the company entitled to prove: *Grissell's Case* (1). I contend, then, that the Appellants are entitled to prove. The case is very like *Ex parte Appleyard* (2).

[COTTON, L.J.:—In that case there was an express agreement to give fully paid-up shares.]

Then, if I can prove, the question arises whether I can prove in competition with outside creditors. Mr. Justice *Kay* considered that we were precluded by the *Companies Act*, 1862, sect. 38, sub-sect. 7. But the language there cannot be construed to include all claims of a shareholder against the company; it must mean only all claims in his character of a member in respect of dividends and profits and matters *ejusdem generis*, as, for instance, directors' fees: *Ex parte Cannon* (3).

[COTTON, L.J.:—Can he compete with outside creditors for a claim under the contract by which he became a member?]

I submit he may, if the money is not payable to him in his character of member.

Marten, Q.C., and *F. B. Palmer*, for the liquidator:—

We rely on the ground taken by Mr. Justice *Kay*, and also on the ground that these shares were improperly issued at a discount, There is no express contract to issue fully paid-up shares: it was a contract to issue shares at a discount, and we contend that such a contract, even if registered, would be invalid. Sect. 25 of the Act of 1867 was not intended to give companies any new power; it only imposed the obligation of registering a contract which would up to that time have been valid without registration, as in *In re Baglan Hall Colliery Company* (4). The memorandum states the nominal amount of the shares, and it is *ultrà vires* to accept less. To issue shares at a discount is a reduction of capital, without any of the safeguards so jealously provided by the *Companies Act*, 1867, to prevent any mischief arising from the reduction. Even the articles of association could not sanction such an interference

(1) Law Rep. 1 Ch. 528.
(2) 18 Ch. D. 587.
(3) 30 Ch. D. 629.
(4) Law Rep. 5 Ch. 346.

with the memorandum: *Trevor* v. *Whitworth* (1); and apart from this, an agreement to take less than the full amount would be void as a *nudum pactum*: *Foakes* v. *Beer* (2). A return of capital clearly could not be made to a shareholder after he had paid up his shares, so neither can a bargain be made before allotment, to do what comes practically to the same thing. This is giving capital as bonus, which is not allowable: *Lydney and Wigpool Iron Ore Company* v. *Bird* (3).

[LOPES, L.J., referred to *Burgess's Case* (4).]

The only cases bearing directly on the question whether shares can be issued at a discount are *In re Ince Hall Rolling Mills Company* (5) and *In re Plaskynaston Tube Company* (6). They are against us, but we contend that they cannot be supported. [*In re Miller's Dale and Ashwood Dale Lime Company* (7) was also referred to.] *Houldsworth* v. *City of Glasgow Bank* (8) shews that a shareholder cannot prove where his claim cannot be severed from his *status* as a member.

If the Appellants can prove at all they cannot prove in competition with outside creditors: *Companies Act*, 1862, sect. 38, sub-sect. 7. The claims here, if allowable at all, are claims for sums due to the Appellants in their character of members, for the demands arise out of the contract by which they became members. The case of *Ex parte Cannon* (9), which has been referred to, shews that the Court will not put a narrow construction on sub-sect. 7.

Farwell, in reply, referred to *Anderson's Case* (10) and *Turner* v. *Browne* (11).

COTTON, L.J.:—

This is an appeal by some preference shareholders of the company who are on the list of contributories, from a decision of Mr. Justice *Kay* refusing to give them leave to prove in the winding-

(1) 12 App. Cas. 409.
(2) 9 App. Cas. 605.
(3) 33 Ch. D. 85.
(4) 15 Ch. D. 507.
(5) 23 Ch. D. 545, n.
(6) 23 Ch. D. 542.
(7) 31 Ch. D. 211.
(8) 5 App. Cas. 317.
(9) 30 Ch. D. 629.
(10) 7 Ch. D. 75.
(11) 3 C. B. 157.

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up for an alleged breach of contract between them and the company, the breach of contract, if any, being a breach of the contract by which they became shareholders. If they are entitled to prove, the question then arises whether they must be postponed to outside creditors.

The first question is—can they prove at all? To my mind it is very doubtful whether there was any such contract as they allege, for it seems to me that there was no contract to issue shares paid up in a particular way, but that the contract was to issue shares at a discount. This, I think, the company had no power to do, and even if a contract to issue shares at a discount had been registered, I doubt whether it would have been valid. Before the *Companies Act*, 1867 (30 & 31 Vict. c. 131), there were cases in which shares were allotted as paid up in full in consideration of services rendered, and on various other grounds, which enabled the company to go before the world under false pretences, as the public would suppose that the shares were taken on the footing of the shareholders paying the amount in cash. The Act of 1867 provided for payment in cash, unless a contract was registered; but it contains nothing to authorize a contract that the shares should not be paid up in full, either in cash or otherwise. But if the contract was to issue fully paid-up shares, I am of opinion that the decision in *Houldsworth* v. *City of Glasgow Bank* (1) precludes us from allowing this proof. A person there who had been induced to take shares by misrepresentations on the part of the company, brought an action of deceit against the bank and its liquidators, after an order had been made for winding up the company. The House of Lords, in substance, said that the claim was made on the ground of misrepresentations which would have enabled the shareholder to repudiate the shares, and separate himself from the company—that he had elected to continue in the company—or, at all events, had taken no steps to repudiate his shares before the winding-up, after which it was too late to do so, and that having thus irrevocably fixed himself with the liabilities of a shareholder, he could not come to claim out of the assets of the company a sum not included in the debts and liabilities, to the payment of which he, as a shareholder, had

(1) 5 App. Cas. 317.

agreed that those assets should be devoted. When these shareholders, supposing the contract to have been a contract to give them fully paid-up shares, got shares which in the eye of the law were not fully paid up, they had a right to say, "You have given us something quite different from what we agreed for, take us off the register," and when that had been done, they might have made a further claim for damages if they had sustained any. But now they come here as shareholders, and in substance retain their shares, and seek to sue the company for breach of the contract under which they took them.

As regards the second question—this is a claim arising out of the contract under which the Appellants became shareholders, and if they could have been admitted to prove at all, I think it would have been very difficult to come to the conclusion that they could compete with the outside creditors.

LINDLEY, L.J.:—

This contract either was a contract to issue shares at a discount, or to issue fully paid-up shares. If the first be the true view, I think that the Appellants were saddled with a liability to pay in full, a liability from which they could not escape, even by a registered contract. The Act of 1867 only regulated the mode of payment, it prescribed that shares must be paid up in cash unless a contract providing for some other mode of payment had been registered, but it contains no provision exempting shares from being paid up in full. I cannot agree with the cases, *In re Ince Hall Rolling Mills Company* (1), and *In re Plaskynaston Tube Company* (2), in which it was held that shares in limited companies could be issued at a discount.

If the other view of the contract be taken—that it was a contract to issue fully paid-up shares, then as these are not fully paid-up shares, the Appellants might have repudiated them—but they have kept them, and cannot now get rid of them. They contend that under these circumstances they can sue the company for the loss they have sustained through the shares not being fully paid up. I am of opinion that this contention cannot be maintained. The principle on which the House of Lords decided

(1) 23 Ch. D. 545, n. (2) 23 Ch. D. 542.

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Houldsworth v. *City of Glasgow Bank* (1) was that a shareholder contracts to contribute a certain amount to be applied in payment of the debts and liabilities of the company, and that it is inconsistent with his position as a shareholder, while he remains such, to claim back any of that money—he must not directly or indirectly receive back any part of it, and this appears to me to govern the present case. I think that the cases before Vice-Chancellor *Hall, Mudford's Claim* (2) and *Ex parte Appleyard* (3), cannot be relied on. In each of those cases there were old debts in payment of which the shares had been given, and this might support the decision that there was a right to prove—but in my opinion the orders were wrong in form. Liberty might perhaps have been given to prove for the old debts, but liberty could not, I think, be properly given to prove for the calls.

LOPES, L.J.:—

I will assume that the contract here was to issue fully paid-up shares, though I doubt it. Then *Houldsworth* v. *City of Glasgow Bank* decides that a shareholder cannot claim damages against the company of which he is a member for misrepresentations by which he was induced to take his shares, his proper remedy is rescission of the contract. Here rescission has become impossible, so the shareholder has no remedy at all against the company. It is urged that this may be distinguished from *Houldsworth's Case*, because there damages were claimed for misrepresentation, here for breach of contract, but that does not appear to me to be a substantial distinction. Our decision may be inconsistent with *Mudford's Claim* and *Ex parte Appleyard*, but I do not think that those cases are to be relied on. I agree with the construction put by Mr. Justice *Kay* on sect. 38, sub-sect. 7, of the *Companies Act*, 1862.

Solicitor for Appellants: *F. Romer.*
Solicitors for Respondents: *Trinders & Co.*

(1) 5 App. Cas. 317. (2) 14 Ch. D. 634.
(3) 18 Ch. D. 587.

H. C. J.

BROWN *v.* BURDETT.

C. A.
1887
Dec. 14.

[1875 B. 152.]

Inquiry as to Delay—Costs—Rules of Supreme Court, 1883, *Order* LXV., *r.* 11.

The powers given by Order LXV., r. 11, of disallowing costs improperly incurred, or rendered fruitless by undue delay, are not confined to delay and costs taking place and incurred after the Orders of 1883 came into operation, but extend to all costs incurred in an action pending when the orders came into operation, which costs had not been already adjudicated upon; and these powers may be exercised by the Judge of his own motion without any request from any of the parties.

The rule extends to cases where in the ordinary course the costs are paid out of a fund, and is not confined to disallowing costs as between the solicitor and his client who has to pay them.

Orders were made before 1883 in an administration action, directing taxation of the costs of the action, but not containing any direction for their payment, nor any declaration how they were to be paid:—

Held, that this was not such an adjudication as to the costs as would prevent the Judge who had finally to dispose of them from exercising any powers which he had as to them under or apart from the General Orders, and that he had jurisdiction to direct an inquiry under Order LXV., r. 11.

Order of *Kay*, J. affirmed.

BROWN, *Burdett* and *Baxter* were the trustees and executors of *Ann Maria Burdett*, who died in 1872. Each of them took benefits under the will, and *Baxter* was residuary devisee. On the 5th of May, 1875, after litigation in the Probate Court, probate of her will and codicils was granted in solemn form. On the 6th of May, 1875, *Brown* filed his bill in this suit against *Burdett* and *Baxter* to have the real and personal estate of the testatrix administered, and the trusts of the will performed under the direction of the Court. On the 21st of November, 1876, a judgment was given directing accounts and inquiries. On the 2nd of August, 1882, the cause came on for further consideration, and by the order then made certain declarations were made as to the construction of the will and codicils, including a declaration that the real estate was charged with debts, legacies, funeral, and testamentary expenses and the costs of suit in exoneration of the personal estate, and directions were given to tax the costs of the Plaintiff

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and Defendants and of certain other persons therein named, who had liberty to attend, the costs of the Plaintiff and Defendants as between solicitor and client, including costs, charges, and expenses, this order to be without prejudice to any application to be made by any of the persons above referred to with regard to the costs of the probate suit. No provisions for the payment of the costs were made. Directions were given to continue the accounts of the personal estate and of the rents of the real estate directed by the judgment. The order went on to direct an account of the rents of an estate specifically devised to the Plaintiff. And if it should appear that the testatrix's *B.* estate would be insufficient to pay one-third of the debts, funeral and testamentary expenses and legacies, and her *G.* estate insufficient to pay another third, that then both those estates should be sold, and the money paid into Court, and that if it should appear that the residuary real estate would be more than sufficient for payment of the remaining third, and also the deficiency (if any) of the proceeds of sale of the *B.* and *G.* estates to pay the other two-thirds, such a sum as the Judge should direct should be raised by mortgage or sale of the whole or a sufficient part of the residuary real estate with the approbation of the Judge. Further consideration was adjourned.

On the 5th of March, 1883, *Baxter* having become bankrupt, *Roberts*, his trustee in bankruptcy, was added as a Defendant.

On the 31st of May, 1883, an order was made declaring that the costs of the probate suit, and the costs of all parties of this action since the 2nd of August, 1882, were payable out of realty in exoneration of personalty, and taxation of them was ordered, with liberty to apply for payment of them out of the proceeds of sale of the real estate.

The order on further consideration was carried into the Taxing Master's office in November, 1882, by Mr. *Woodall*, the Plaintiff's solicitor, but he did not lodge his bill of costs till December, 1886. On the 28th of November, 1885, however an order was made for payment to him, out of the funds in Court, of £600 on account of his costs.

The order of the 31st of May, 1883, was carried into the Taxing Master's office on the 17th of December, 1884. Mr.

Woodall lodged no bill of costs till December, 1886. The taxation of the Plaintiff's costs was completed in February, 1887. In the same month Mr. *Woodall* died, and Mr. *Barrs* was substituted for him as the Plaintiff's solicitor. The taxation of the costs was not completed till July, 1887.

On the 29th of October, 1887, the cause came on for hearing on subsequent further consideration, and was proceeded with again on the 4th of November.

Mr. Justice *Kay* on the case being opened adverted to the great delay that had taken place in the prosecution of the action, and ultimately stated that though none of the parties opposed an order for payment of the costs, he should not at present decide as to their payment, but should direct an inquiry under Order LXV., rule 11. No discussion took place as to the points afterwards raised in the Court of Appeal, and his Lordship directed that an inquiry should be made by the Taxing Master under Order LXV. rule 11, what was the occasion of the great delay in the prosecution of the action, what costs had been occasioned by such delay, and who, whether parties or solicitors, were responsible for such delay, and the costs occasioned thereby, or any part thereof, and that the solicitor for the Plaintiff should attend before the Taxing Master and shew cause.

No order was drawn up, but the inquiry directed by Mr. Justice *Kay* was proceeded with.

On the 29th of November, the Plaintiff's solicitor Mr. *Barrs*, who was a mortgagee of Mr. *Woodall's* costs, the Plaintiff, and another person who was mortgagee of the same costs, gave notice of appeal that the order or directions given by Mr. Justice *Kay* as above might be discharged, and that it might be declared that the Plaintiffs and Defendants and parties having liberty to attend named in the order in further consideration of August, 1882, were entitled to be paid the whole of their costs of this cause or the balance thereof then due to them respectively.

T. Brett, for the Appellants:—

I contend that the costs in question had already been allowed by Vice-Chancellor *Bacon*, and that Mr. Justice *Kay* has no jurisdiction to disallow them now. The allowance of costs carries

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subsequent costs: *Krehl* v. *Park* (1); *Quarrell* v. *Beckford* (2). A direction to tax costs is an allowance of costs: *Clutton* v. *Pardon* (3); *Wilson* v. *Metcalfe* (4). I say, then, that the orders of Vice-Chancellor *Bacon* conclude the case. The rule Order LXV., r. 11, is not to be taken as retrospective. The Order LXV., r. 1, was held not to apply to costs incurred before the rules came into operation so as to make costs not appealable: *In re McClellan* (5). The rule only applies to cases where costs are to be paid by the parties, not to cases where they are payable out of a fund.

[*Furness* v. *Davis* (6), *In re Bradford* (7), and *In re Massey & Carey* (8) were also referred to.]

Swinfen Eady, for *Roberts*; and *Dibdin*, for certain parties having liberty to attend, stated in answer to a question from the Court, that they did not assent to the appeal, and were not further called upon.

COTTON, L.J.:—

This is an appeal against an order made by Mr. Justice *Kay*. I doubt whether the appeal ought to have been set down, as there is no order drawn up. On the action coming on for further consideration Mr. Justice *Kay* refused to provide for the costs of the suit until he knew certain facts, and for the purpose of ascertaining those facts he directed inquiries. He made no order, and in fact merely directed the cause to stand over until those inquiries had been answered. The inquiries were directed under Order LXV., r. 11. The delay in this action was certainly very great, as it is an administration action which was begun in 1875, has been continued down to 1887, and is not yet finally disposed of. Mr. Justice *Kay* therefore directed an inquiry to ascertain what was the cause of the delay, and what costs had been occasioned by such delay, and who (whether party to the cause or solicitor) is responsible for such delay, and the costs occasioned thereby, or any part thereof. He has not decided what shall be done, nor could he do so until those inquiries had been answered. Now

(1) Law Rep. 10 Ch. 334.
(2) 1 Madd. 269.
(3) T. & R. 301.
(4) 1 Russ. 530.
(5) 29 Ch. D. 495.
(6) 33 W. R. 320.
(7) 15 Q. B. D. 635.
(8) 26 Ch. D. 459.

from that there is an appeal. I feel the greatest reluctance in entertaining any such question as this. As regards the costs incurred subsequently to the Orders coming into operation in October, 1883, there is no question that the matter was within the discretion of the Judge, and that there is no right of appeal, but as regards costs before that time there is a right of appeal, and these objections were taken—that the costs have already been allowed to parties in this action, and that Order LXV., r. 11, is not retrospective. There is another argument, viz., that Order LXV., r. 11, does not apply to a case where costs are payable out of a fund. The matter is an important one, not only to those who have been engaged as solicitors in this action, but also to those whose estates have to be administered by the Court.

Now have these costs been already allowed? Reliance is placed on orders made by Vice-Chancellor *Bacon*, in which he directed taxation of costs. No doubt those orders were made on the footing and in the expectation that payment of those costs would ultimately be ordered out of the estate. At that time it was considered as a matter of course that in the absence of special circumstances the costs of an administration action would be paid out of the estate. That was referred to in *In re McClellan* (1), where we reluctantly followed, though we did not approve of, the decision in *Farrow* v. *Austin* (2), that the costs of a residuary legatee filing a bill for administration, which were incurred before the Orders came into operation, were costs to which he had a right, and that an appeal would lie as to them. Order LXV., r. 11, was intended to call the attention of the Judges to the great evil caused by unnecessary delay in administration actions, and to give them power to punish it by disallowing costs even as between a solicitor and his client, and to call upon the solicitor to come before the Judge to shew cause why certain costs should not be disallowed. I cannot consider that the orders which have been made by Vice-Chancellor *Bacon* are an allowance of these costs in the sense that the Judge is prevented from now dealing with them, or from exercising the powers which he has independently of the Rules and Orders, or the powers given *de novo* by the Rules and Orders. It is said that there are authorities the

(1) 29 Ch. D. 495. (2) 18 Ch. D. 58.

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other way, and *Quarrell* v. *Beckford* (1) was referred to. The suit there was for foreclosure, and the original decree had directed the mortgagee's costs of the action to be taxed, and to be added to the principal and interest due to him upon his security. That was in fact providing for payment, because it gave him a right to say, "these costs are secured by my mortgage, and I cannot be redeemed until these costs as well as the principal and interest are paid." The only question which subsequently arose there was whether the order for taxation which had been made at the hearing included costs subsequent to the decree. Then there was a case of *Wilson* v. *Metcalfe* (2), which is more like the present case, but there the Master of the Rolls went upon *Quarrell* v. *Beckford*, apparently without looking to see what was the reason for the decision in that case. In my opinion the orders of Vice-Chancellor *Bacon* do not preclude the Judge who has to dispose of the costs of the action from dealing with them in any way in which he could deal with them apart from those orders. The application which was made before Mr. Justice *Kay* as to the costs appears not to have been opposed, which may account for Mr. Justice *Kay* acting as he did. We often have to take a similar course in Lunacy, where all parties agree that out of some one else's money certain costs should be paid, and then we are forced to see whether it is right that this expenditure should be made, not out of the money of the parties themselves, but out of the estate which we have to administer. In my opinion we are not bound by authority or principle to recognise the orders of Vice-Chancellor *Bacon* as disposing of the costs, or as fettering the power of Mr. Justice *Kay* to deal with them.

Now is this case within Order LXV., rule 11? I was rather surprised at the argument that this rule does not apply to cases where the costs are to be paid out of a fund. I believe that this rule, though I was no party to making it, was intended mainly to apply to cases where costs are payable out of a fund; and to confine it to the cases where an individual has to pay the costs seems to me to go far towards making the rule inoperative. The rule speaks of costs as between solicitor and client, and enables the Court to relieve the client from paying them, but it does not

(1) 1 Madd. 269. (2) 1 Russ. 530.

shut out the case where costs are to be paid out of the estate. In my opinion that argument entirely fails.

Then it is said that the rule is not retrospective. That is a more doubtful point. Cases were referred to which did not turn upon this Order, but had reference to the right of appeal on the question of costs. It was decided, and I have no reason to doubt that it was rightly decided, that although the 1st rule of Order LXV. put the costs even of administration actions in the discretion of the Judge, that did not apply to costs incurred previously to these Orders, so as to deprive parties of their right to appeal from the disallowance of costs to which according to the former practice they were entitled to consider that they had a right. The question here is whether the Judge who exercises the power given by Order LXV., rule 11, is confined to inquiring whether since the Order came into operation there has been any unnecessary delay. I think that this view ought not to prevail, as it would render the rule for a long time utterly inoperative. In my opinion, although costs up to the time when the Orders came into operation were considered to be the right of the parties in an administration action, this rule interposes and gives power to the Court to inquire whether any of those costs have been occasioned by delay or improper proceedings, though the action may not have been improper. In my opinion the rule not being confined in its terms to costs incurred subsequent to the orders coming into operation, but being worded generally, ought to be construed so as to enable the Court to consider, not only the costs incurred subsequently to the General Order, but costs incurred in an action pending at the time the Order came into operation, though the costs may have been incurred before that time.

In my opinion the appeal fails, and must be dismissed.

LINDLEY, L.J.:—

I also think that this appeal ought not to prevail. The power given to the Court by Order LXV, rule 11, is in some respects new. If you look at the wording nothing can be more general, and if you look at the object of it nothing, in my judgment, can be more beneficial. I take the same view of the rule that

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Mr. Justice *Kay* takes, and if it appears in any Chancery administration action that there has been an apparently unjustifiable and avoidable delay, it is perfectly competent for the Judge, unasked by the parties and in the exercise of his discretion, to direct an inquiry in order to ascertain the facts and find out whose fault it has been that that unnecessary delay has been caused. I think that is the true interpretation of the rule. What is to be done when the inquiry is answered is quite another matter. In this particular case care will have to be taken in making an order with respect to the costs, but we have not got so far as that at present. Mr. *Brett's* contention is that the Judge had no jurisdiction to direct such an inquiry as he has directed, but it appears to me that, if he has not, the rule may as well be struck out. It is precisely to meet a case like this that the rule was made. Without expressing any opinion as to what should be done with the costs, I am not prepared to sanction the proposition that the Judge had not jurisdiction to direct this inquiry and find out if he can to whom this apparently unjustifiable delay is due. The appeal will be dismissed with costs.

Solicitor for Appellants: *H. H. H. Barrs.*
Solicitors for *Roberts: Field, Roscoe, & Co.*
Solicitor for parties having liberty to attend: *C. T. Foster.*

H. C. J.

SOCIÉTÉ GÉNÉRALE DE PARIS *v.* DREYFUS BROTHERS.

C. A. 1887 Dec. 16, 17.

[1885 S. 385.]

Practice—Service out of the Jurisdiction—Discretion of the Court—Res Judicata —Rules of Supreme Court, 1883, *Order* XI., *r.* 1, *sub-s.* (*f*).

On an application for leave to serve a writ out of the jurisdiction it is not sufficient that the form of the action and the nature of the relief sought bring the case within Order XI. The plaintiff must shew to the satisfaction of the Court that he has a probable cause of action; and the Court in exercising its discretion will consider the facts of the case appearing on the affidavits, so far as may be necessary for that purpose.

A sum of money was paid into Court in an action in this country in which *D.* was the Plaintiff. *D.* was resident in *France*. This fund was the subject of litigation between *D.* and the present Plaintiffs in *France*, and judgment was given in the French Courts that *D.* was entitled to the control of the fund in Court subject to the liability to account to the Plaintiffs. The Plaintiffs brought an action in this country asking for an injunction to restrain *D.* from receiving or dealing with the fund in Court, and applied for leave to serve the writ on *D.* in *France*:—

Held, that the French Court having decided that *D.* was entitled to the control of the fund, leave to serve the writ ought not to be given.

THIS was an appeal from a decision of Mr. Justice *Pearson* (1), the effect of which was to give leave to the Plaintiffs to serve the Defendants with the writ out of the jurisdiction under Order XI., rule 1, sub-sect (*f*).

The Plaintiffs were a French company, whose offices were in *Paris*. The Defendants were *Auguste Dreyfus*, a domiciled Frenchman, resident in *Paris*, and sued as *Dreyfus Brothers*, the *Peruvian Guano Company* (an English company), and *B. Premsel*, a domiciled Frenchman, resident in *Paris*.

A large sum of money, amounting to about £200,000, being the proceeds of certain cargoes of guano received by *Dreyfus Brothers*, had been paid into Court to the credit of an action of *Dreyfus* v. *Peruvian Guano Company*. This sum of money was the subject of litigation in the present action in this country, and also in two actions in *France*. The facts are stated at length

(1) 29 Ch. D. 239.

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in the previous report. The writ in the present action was indorsed with a claim for (1) a declaration that the money in Court to the credit of the action *Dreyfus* v. *Peruvian Guano Company* belonged to the Plaintiffs and the other parties interested under a contract of the 6th of July, 1869, made between the Defendants *Dreyfus Brothers* of the first part, *Leiden Premsel & Co.* of the second part, and the Plaintiffs of the third part; (2) a receiver; (3) an injunction restraining *Dreyfus Brothers* from receiving or dealing with the funds in Court.

Mr. Justice *Pearson* held that on the evidence before him there was a grave question which had not been decided by the French Courts, namely, whether, having regard to the terms of the contract between the parties on the 6th of July, 1869, which was a contract of partnership or participation, the Plaintiffs and *B. Primsel* had a right to any part of the proceeds of the guano, or only a personal right to an account against *Dreyfus Brothers*, and to stand as creditors against them for what should be found due on taking the account. His Lordship was of opinion that this point had not been decided by the French Courts, and he considered that in the exercise of his discretion under Order XI., rule 1, sub-sect (*f*) it was a case in which leave ought to be given to serve the writ out of the jurisdiction. The Defendants appealed from this decision.

After the date of the order made by Mr. Justice *Pearson* further litigation took place in *France*.

The Plaintiffs, the *Société Générale*, and *Premsel*, brought an action before the Tribunal of Commerce of the Department of the *Seine* claiming a right to receive as against *Dreyfus Brothers* all sums arising out of the guano contract of the 5th of July, 1869, and in particular the sum of 5,300,000 francs, being the sum deposited in Court in *England*, and asked for a receiver to receive that sum of money. Judgment in this action, which was referred to as the receiver action, was given by the Tribunal of Commerce on the 21st of November, 1885, in favour of the Defendants, *Dreyfus Brothers*.

That judgment declared that the demands of the *Société Générale* were unfounded; that *Dreyfus Brothers* alone had the right, as well with respect to third persons as to the participants, of

receiving all sums arising from the execution of the guano contract, and expressly the 5,300,000 francs arising from the cargoes realised in *England*, and the prices of which were deposited in the Court of *London*; that by the terms of the contract of participation the *Société Générale* had no right to require the payment into its hands of the sums arising from the guano contract, or to object to their being paid to *Dreyfus Brothers*; and that in its relations with *Dreyfus Brothers* the *Société Générale* had no right of property in those sums, but only a contingent right of debt against their co-participants.

This judgment was affirmed by the Court of Appeal of *Paris* on the 22nd of April, 1886, and by the Court of Cassation on the 12th of July, 1887.

M. *Henri Barboux*, a French advocate, made an affidavit in which he stated that in the judgment in the action of *Dreyfus Brothers* against the *Société Générale* given by the Court of Appeal of *Paris* on the 22nd of April, 1886, the participation, or partnership, was treated as being in liquidation, and that *Dreyfus Brothers* were treated as liquidators, and were ordered to render accounts to their participants, and that according to the ordinary principles of the French law, when a business was in liquidation, if the liquidator received any important sum of money which could not be at once distributed, he would be called upon to deposit it in a public depository, and his partners would have a right to insist on this being done; but that as the fund in this case was in *England* it was impossible to enforce that right without having recourse to the English Court.

On the other hand, M. *P. Boivin-Champeux*, another French advocate, in his affidavit said that *Dreyfus Brothers* were not treated in the French proceedings as liquidators of a partnership in liquidation, but, as the managers of a subsisting partnership; and he also deposed that it was an error to say that the *Société Générale* could not claim from a French tribunal an injunction to restrain *Dreyfus Brothers* from receiving the money deposited in *England*.

Sir *H. Davey*, Q.C., and *Ingle Joyce*, for the appeal:—

This case comes before the Court under altered circumstances,

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for the main point of French law has in the meantime been decided in *France*.

[*Cozens-Hardy*, Q.C. :—I take the preliminary objection that the Court cannot go into anything but the question whether the case came within Order XI, rule 1.]

Our objection to the order for service abroad is that the affidavit on which it was obtained was untrue, though not wilfully so. It was founded on the existence of a partnership between the Plaintiffs and the Defendants. The parties were both French, carrying on business in *Paris*. A decree was made in *Dreyfus* v. *Peruvian Guano Company* deciding that certain cargoes belonged to *Dreyfus & Co.*, and this was affirmed by the House of Lords subject to the Plaintiffs making certain allowances to the Defendants. The value of those cargoes is now in Court in that action, and the present action relates to them. There was no partnership between the Plaintiffs and the Defendants, and we had evidence from French lawyers to that effect in the Court below. We contend that condition 5 of the contract entitles us to receive the money on behalf of all parties. That the writ asks for an injunction is not enough. A case for an injunction must be shewn.

Rigby, Q.C., and *Cozens-Hardy*, Q.C., for the Plaintiffs, in support of the preliminary objection :—

An injunction is asked for, therefore the case is clearly within Order XI., rule 1 (*f*), and we say that it is also within Order XI., rule 1 (*g*). The affidavit is in every respect accurate except in translating "participation" as "partnership." The case is in substance decided by *Call* v. *Oppenheim* (1), which is similar in principle though the facts were not quite the same.

[COTTON, L.J. :—The right of action there depended on a point of English law. Here on a point of French law, which to us is merely a question of fact.]

There is an important contest as to the facts, and the Court will not decide it on an application of this kind.

(1) 1 Times L. R. 622.

COTTON, L.J.:—

This cannot be treated as a preliminary objection. In order to dispose of the case we must know the facts which the Appellants wish to bring before us.

LINDLEY and LOPES, L.JJ., concurred.

Sir *H. Davey*, Q.C., and *Ingle Joyce*:—

The judgments of the French Courts dispose of the Plaintiffs' case. That of the 21st of November, 1885, covers every possible form in which the case put forward in the affidavit in support of the application for service abroad can be put. Therefore the Court in the exercise of its discretion ought not to grant leave to serve the writ.

Rigby, Q.C., *Cozens-Hardy*, Q.C., and *Butcher*, for the Plaintiffs:—

The question at issue in this action, namely, whether under the contract the Plaintiffs have a right in the fund as participators, has never been decided by the French Courts. But if we are wrong in that contention, we have still a claim for the intervention of this Court. For the business carried on by the parties under the contract is in liquidation, and *Dreyfus Brothers* are in the position of liquidators, and ought to be restrained by the Court from dealing with the fund, until the accounts have been taken and the rights of the parties ascertained. The French Courts have no power to protect the fund. There is a conflict in the affidavits of the French advocates as to the powers of the French Courts and the effect of the judgments, which can only be dealt with in this action after the Defendants have appeared.

Sir *H. Davey*, in reply, as to the costs.

COTTON, L.J.:—

This is a motion by way of appeal from a decision of Mr. Justice *Pearson* to discharge an order made by him for the issue of a writ for service out of the jurisdiction, and for liberty to serve notice of that writ out of the jurisdiction, namely, in *France*. It is a somewhat singular case, because both Plaintiffs and Defendants

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are French people domiciled in *France*, and there are Courts in that country. But the Plaintiffs come here saying that it is a case which is within Order XI., rule 1, for it is an action in which it is sought to get an injunction with reference to a large sum of money which is in Court in this country. That is so, and it is really, therefore, within one of the sub-divisions of Order XI., rule 1. But was it right to bring the action here? Or rather, was it right of the Court, in the discretion given to it, to authorize the issue of the writ, and to authorize notice of that to be served in *France?*

When the case was before Mr. Justice *Pearson* on the evidence by affidavit he declined to discharge the order, and, as I understand, he declined to discharge it on a view of what were the rights of the parties under a particular clause in the contract of participation which had been entered into between the Plaintiffs and Defendants. He thought that the evidence was doubtful on what must be a question of fact, namely, the rights of the parties under this contract, which was a French contract made between domiciled Frenchmen. I call the *Société* Frenchmen, because it is a French society. But now we have a great deal more. At the time the order was made by Mr. Justice *Pearson* there was an action brought by *Dreyfus* in *France* in order to have his rights established under the contract as against the other contracting parties, but since that order was made by Mr. Justice *Pearson* refusing to discharge the issue of the writ and the order for service, there have been other proceedings taken by the *Société* as against *Dreyfus* in order to have it established in the French Courts that the *Société* had a right to receive this sum either under the general law applicable to such cases, or under the particular terms of the contract on which Mr. Justice *Pearson* rested his decision. That has been through all the Courts there, and the Court of Appeal in *Paris* and the *Court de Cassation* have decided against the claims which were raised by the *Société.*

Now that really shews that the *Société* were wrong in trying to establish their claim to this fund in *England* on the grounds which were relied on by them. In the writ which was authorized to be served they put their claim in this way—these funds are assets of a partnership, we have a right to receive them as against

Dreyfus, or, at any rate, the Court ought to grant a receiver and injunction. That was expressly decided against the *Société* in these proceedings taken by them, and so it was ultimately conceded by Mr. *Rigby*. That being so, we must take it that on that point as to the right to a receiver and the right to receive the fund personally, the *Société* were wrong in their contention as Plaintiffs here.

Then it was said there was another point, although not raised before the tribunals in *France*, which would, on the evidence before us, entitle the *Société* to a receiver, or make it probable that the *Société* was entitled to that relief. That was the evidence of Mr. *Barboux*, who is their witness. It is pointed out, and it has not been displaced at all, either by Mr. *Rigby* or Mr. *Cozens-Hardy*, that the very fact on which Mr. *Barboux* says the further right to get a receiver would depend, namely, that the participation or partnership was in liquidation, was actually before the Court of Appeal when the proceedings were before it, and when it made the order of the 22nd of April, 1886, affirming the decision of the Court of first instance, which decided that the *Société* had no right personally to receive, and no right to get a receiver of this fund.

That being so, really the whole case of the Defendants has been proved. That is to say, it has been established by the best evidence possible that the matter of fact on which the right of the Plaintiffs in *England* depends does not exist.

Then what ought we to do? If we are satisfied that the tribunals in *Paris* had not power to protect this fund if they thought right to do so, I should hesitate about discharging the order for the issue of this writ, and for service abroad. But Mr. *Barboux's* affidavit, on which reliance was placed by Mr. *Rigby* and Mr. *Cozens-Hardy*, in my opinion shews quite the contrary. He explains why a receiver would not be granted when the *Société* was not in liquidation, because it would interfere with the rights and powers and duties of the manager, who in this case was Mr. *Dreyfus*, the manager of the business which was carried on by the *Société*. But when the *Société* is in liquidation, which to my mind can have no other meaning than this, when it is only carrying on its business so far as necessary for the purpose of

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winding up its affairs, paying its debts and distributing its proceeds, that does not apply. If that is so, if in fact they will, in consequence of that liquidation being so established or existing, be entitled in *France* to get a receiver, they can do it, but in my opinion, if it comes before us as a question of fact, I should say that the highest tribunal has decided what the French law is, and therefore gives us positive evidence that they are not entitled there, or consequently here, to get any receiver of this fund.

That being so, what ought we to do? In my opinion, although we determine this matter on evidence now brought before us which was not before the Court below, shewing conclusively what the French law, as a matter of fact for us to decide, is, we ought not to allow this action to go on. The Defendants have not appeared, that is to say, they have only appeared conditionally in order to discharge the order which has been made by Mr. Justice *Pearson* for liberty to issue the writ and for service of notice abroad. I think, therefore, the proper thing to be done is to discharge the order in Chambers and Mr. Justice *Pearson's* order, and to discharge the writ. That will put an end to this action.

It is said that we are wrong in considering these questions into which I have entered. That argument was principally based on a case before the other branch of the Court of Appeal, but there are enormous differences between that case and this. There there was an English contract, because it was a bill of exchange accepted in *France* but accepted payable in *England*, and there were grave questions as to what was the effect and validity of that judgment which had been given in *France* with reference to the matter. That is a very different matter from that which appears before us now, where we have this judgment of the highest tribunal in *France*, which really decides the matter.

As a rule one ought not to enter into the questions which are to be decided at the trial of the action. But then rule 1 of the Order requires that every application for leave to serve such writ shall be supported by an affidavit or other evidence stating that in the belief of the deponent the Plaintiff has a good cause of action. Now that affidavit was made. The fact that such an affidavit is to be made shews that the Court ought to consider

whether there is a probable cause of action in respect of which the writ is sought to be issued and notice to be served abroad. Here that depended not on a question of English law but on a question of fact. Now that fact has been established by the best possible evidence, by the Courts which can decide what is French law deciding what the fact is, and the fact is shewn to be that there is no cause of action.

Therefore, in my opinion, having regard to that rule, not only are we justified, but we ought, in a case like this, to inquire into any matter which is brought before us by the parties served, shewing that the supposition upon which the Judge made the order for the issue of the writ was erroneous and does not exist.

In my opinion, therefore, the Appellants are entitled to the order for which they ask.

Then as to costs. That I doubted about, as we were having the matter here on evidence not before Mr. Justice *Pearson*. But it is shewn now that the affidavits which were before Mr. Justice *Pearson* on behalf of *Dreyfus* correctly stated the fact that was disputed by the other side. They ought never to have stated to the Court that a fact existed which the tribunals in *Paris*, the Court of Appeal, and the *Court de Cassation* have shewn to us never did exist. This also is to be considered, that the matter stood over after the appeal was presented and before it came before us, in order that the Plaintiffs, the *Société*, might bring the matter before the French tribunals to decide this matter between the parties in order to get their decision to shew which was right and which was wrong in the allegations of fact which they raised before Mr. Justice *Pearson*.

I think, therefore, we cannot do otherwise than, in discharging the order made by Mr. Justice *Pearson*, to give the Appellants, Messrs. *Dreyfus*, the costs both here and below.

LINDLEY, L.J.:—

I am of the same opinion, and I cannot help thinking if the facts now before us had been before Mr. Justice *Pearson* leave to serve this writ abroad would never have been granted.

The controversy is of this nature. The *Société Générale de Paris* and Messrs. *Dreyfus* and some other gentlemen entered

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into a French contract, all being French subjects, for the participation of profits in a certain adventure, and their rights upon that contract depend upon the French law and French law only; there is no English law in the matter. It so happens that there is standing to the credit of a cause in the High Court a very considerable fund which has been ordered to be paid out to Messrs. *Dreyfus;* and the *Société Générale* by their writ in this action ask for a declaration that they are entitled to have that fund; they ask for a receiver, and for an injunction to restrain *Dreyfus* from receiving it. Under those circumstances they apply for leave to serve the writ in that action against *Dreyfus.*

We have now the matter established clearly enough to enable us to see our way with perfect precision. It is established beyond all possibility of controversy that by French law the *Société Générale* are not entitled to receive that money; that they are not entitled to prevent Messrs. *Dreyfus* from receiving the money, and that Messrs. *Dreyfus* are the proper people to get it. It is also not in controversy at all that when Messrs. *Dreyfus* have got it, it must be brought into account and accounted for by them as part of the moneys which are subject to the contract to which I have referred. But they are the people to get it; even according to the affidavit which we have last had before us and relied upon by Mr. *Rigby,* it seems to me to be quite plain that the proper mode of proceeding, even in *France,* is this, to let Messrs. *Dreyfus* get in that outstanding asset. Whether, when they have got it, matters are sufficiently in liquidation to enable the *Société Generalé* to have it deposited is a question for the French Courts not for us; but it is impossible for Messrs. *Dreyfus* even to comply with any order of that kind unless they get the fund from us. It is an outstanding asset which the French Courts say Messrs. *Dreyfus* are to get in, and no one has a right to say they shall not get it in. That appears to be the simple answer to the case.

We are referred to Order XI., and it is contended, that inasmuch as an injunction is asked, and as an affidavit has been made in the terms required by that order, we have no right to refuse leave to serve this writ, and it has been contended, upon the authority of *Call* v. *Oppenheim* (1), that if we do we shall be

(1) 1 Times L. R. 622.

running counter to a decision of the other branch of this Court. I differ entirely from every one of those allegations. In the first place, Order XI. enumerates certain circumstances under which, and under which alone, the Court can give leave to serve writs out of the jurisdiction. It does not say that when those circumstances occur the Court is bound to give leave. On the contrary, the language is that service out of the jurisdiction "may be allowed by the Court or a Judge" in certain specified events. This shews that the Court has a discretion and is bound to exercise its discretion. This becomes still plainer by turning to rule 2, which states certain matters which the Court is bound to have regard to when it is asked for leave to serve a writ in *Ireland* or *Scotland*. It is not that you are entitled to have leave simply because you bring your case within one or the other of the eleven rules of Order XI. You cannot get the leave unless you do, but it does not follow if you do you are to have the leave. The Court has a discretion, and that discretion must of course be exercised judicially, and upon proper grounds.

Then it is said you cannot go into the merits. That is quite true. Of course you cannot properly upon an application to serve a writ try the action. The object in giving leave to serve the writ is to put the parties in a position to try the action by-and-bye, but at the same time a judge cannot perform the duty imposed upon him by this Order unless he so far look into the matter as to see whether the plaintiff has a probable cause of action or not. I do not think the Court ought to look into the defence as distinguished from the plaintiff's case. The Court must look at the plaintiff's case and see whether he has a probable cause of action. If he has no probable cause of action, and if the cause of action depends entirely upon foreign law, and the proper foreign tribunal has decided against him, that he has no cause of action, there is no ground for exercising the discretion of the Court and the Court ought to refuse the leave to serve the writ. That is not contrary to *Call* v. *Oppenheim* (1), as I understand it, but quite the reverse. *Call* v. *Oppenheim* does not contain a word which goes to shew that if the Court sees the plaintiff has no case, and if it has already been decided by a

(1) 1 Times L. R. 622.

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competent Court that he has no such right as he alleges, this Court should go through the farce of giving leave to serve a writ out of the jurisdiction when there is nothing to be gained by it. Therefore, it appears to me, now we have the materials before us in the shape in which we have, that this is a case in which leave to serve the writ abroad ought not to be given, and the appeal must be allowed.

Then, as regards the costs, no doubt there is a little difficulty in consequence of fresh facts having come forward, but the broad result is this, that Messrs. *Dreyfus* were right throughout. This was a very speculative action. When one foreigner sues another in the Courts of this country on a foreign contract he is making a very hazardous experiment in asking for leave to serve the defendant, a foreigner, out of the jurisdiction. If he is wrong, if his opponent is right from the first, I cannot see on what principle the defendant ought not to be indemnified, and should not have costs. It appears to me, therefore, the appeal ought to be allowed with costs here and below.

Lopes, L.J.:—

Allowing or disallowing service out of the jurisdiction is a matter of discretion. If a *primâ facie* case is made on the affidavits that there is a cause of action within Order xi., and the rules of that Order, the Court in its discretion permits the service. If, on the other hand, no such case is made out, or if it is shewn by the party on whom service is sought to be effected that there is a clear and complete defence, the Court in its discretion does not grant but refuses such service. Applying that to the present case, it appears to me that if this action proceeded, and the judgments in the French Courts were pleaded, they would furnish a complete answer to the case which the Plaintiffs now set up on the ground of *res judicata*. Therefore, to permit the service to continue would be vexatious and oppressive towards the Defendants. I think, therefore, the service should not be allowed.

But it is said that this decision is not in accordance with the decision of *Call* v. *Oppenheim* (1), in the other Division

(1) 1 Times L. R. 622.

of this Court. In my opinion the decision is in no way inconsistent with that case. It is said that on an application like the present the Court is not entitled to go into the merits of the case. That is perfectly true. The Court does not go into the merits in the sense of deciding the case, but it is clear that the Court must to a certain extent go into the facts in order to determine whether or not there is a cause of action, or whether or not there is a complete answer to that cause of action which can be furnished by the Defendants.

The appeal, in my opinion, therefore succeeds.

Solicitors: *G. M. Clements; Michael Abrahams, Son, & Co.*

M. W.

LYNCH *v.* MACDONALD.

[1886 L. 2017.]

Practice—Mode of Trial—Rules of Supreme Court, 1883, *Order* XXXVI., *rr.* 3, 6, 7 (*a*).

The Plaintiff brought an action for redemption of shares mortgaged by him. The Defendant by counter-claim sought relief incident to his position as mortgagee, and also damages for alleged fraudulent misrepresentations made by the Plaintiff to the Defendant which affected the amount of the balance to secure which the mortgage was given. The Plaintiff applied to have the action tried with a jury, which *North*, J., refused:—

Held, on appeal, that the case did not come within Order XXXVI., r. 6, so as to give the Plaintiff a right to have the action tried with a jury—that his proper course would have been to apply to have the counter-claim for damages tried separately, as a claim which could not be conveniently tried in the pending action, and that the appeal must be dismissed.

THIS was an action in the nature of a redemption action. It was alleged by the statement of claim to the effect that the Plaintiff in the autumn of 1883 was entitled to 600 fully paid-up shares of £10 each in the *Griqualand Public Works Company*. That in that year he was indebted to *Blaine, Macdonald & Co.* in the sum of £7191 14*s.* 8*d.* That he accepted four bills drawn by the firm, each for one-fourth of that amount and interest, and as collateral security he deposited with the firm the certificates of

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his shares. That the firm was dissolved, and in May, 1885, two of the bills were indorsed by the firm to the Defendant, who had been one of the partners, and 300 of the *Griqualand* shares were transferred to him. That the Defendant had sold 156 of the shares in the manner and under the circumstances alleged in the statement of claim, and that such sale was unjustifiable. That the Defendant had improperly concurred in arrangements by which the undertaking of the *Griqualand Public Works Company* had been sold to the *Kimberley Company* on the terms that for each share in the *Griqualand Company* the holder received three shares of £10 each in the *Kimberley Company*, credited with £7 paid thereon. The Plaintiff claimed (1) an account of what, if anything, was due from him to the Defendant upon the security of the shares, and to redeem the same; (2) a return of the shares; (3) if the shares were not returned, then damages for the conversion thereof; (4) damages for the wrongful acts of the Defendant; and (5) the costs of the action.

It turned out that the 156 *Griqualand* shares which had been sold by the Defendant were shares of his own which he had sold by mistake, and he offered the Plaintiff the option of accepting this sale as a sale of part of the Plaintiff's shares, leaving 144 to be accounted for, which had been converted into 432 *Kimberley* shares.

By an order of the Court of Appeal dated the 3rd of March, 1887, it was ordered that, the Plaintiff electing to treat the sales and transfers of the 156 *Griqualand* shares as sales and transfers of his shares, and electing to treat the 432 *Kimberley* shares as subject to the Defendant's security, and waiving any claim for damages for conversion of the 144 *Griqualand* shares into the 432 *Kimberley* shares, and upon payment by the Plaintiff to the Defendant of £238 8*s.* 10*d.*, being the balance claimed by him upon his security without prejudice to an account being subsequently taken, and upon payment into Court by the Plaintiff of £2000 to answer the claim of the Defendant in respect of the *Harsant* claim, presently to be mentioned, and also of £500 for security for costs, the Defendant should deliver to the Plaintiff the certificates for the 432 *Kimberley* shares, and transfer the shares to the Plaintiff.

The Defendant, after this, put in a defence and counter-claim by which he alleged that £7191 had been arrived at as the amount due from the Plaintiff to *Blaine, Macdonald & Co.* on the representation of the Plaintiff that the proceeds of certain *Kimberley* shares sold by the firm were properly credited to the Plaintiff, and that one *Harsant*, who claimed an interest in them, was the Plaintiff's creditor, and not the creditor of the firm in respect of the proceeds. That in the autumn of 1884, *Harsant* came to this country and brought an action against the firm for the proceeds. That the Court of Appeal had decided in favour of the firm, but that *Harsant* had appealed to the House of Lords, and if the appeal were successful the debt due from the Plaintiff to the Defendant on his security would be considerably increased. The Defendant referred to the order of the Court of Appeal dated the 3rd of March, 1887, and then by way of counter-claim repeated *inter alia* the above statements as to *Harsant's* action, and then by par. 19 alleged that if the decision of the Court of Appeal in *Harsant's* action should be reversed by the House of Lords, the Defendant would further have suffered damages by the Plaintiff having falsely and fraudulently represented to the Defendant and to the other members of his firm that the accounts sent by the firm to him crediting him with the proceeds of the sale of the *Harsant* shares were correct, and that he had settled with *Harsant* on the footing that *Harsant* should look to him and not to the firm for the proceeds of the shares, and that they were properly placed to the credit of the Plaintiff in his account with the firm, and that he owed *Harsant* £2000, and the firm did not owe *Harsant* anything.

The Defendant counter-claimed (1) an account of what was due from the Plaintiff, including, in the event of the decision of the Court of Appeal being reversed, half the indebtedness of the Plaintiff to the firm of *Blaine, Macdonald & Co.*, against which the proceeds of the *Harsant* shares were credited, and interest; (2) sale of the 432 *Kimberley* shares; (3) payment out of the proceeds of sale what should be found due from the Plaintiff; (4) damages under par. 19; (5) costs.

On the 10th of November, 1887, an application by the Plaintiff in Chambers that the action might be tried by a Judge with

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a jury was refused. The Plaintiff then gave notice of motion that notwithstanding the previous refusal an order might be made directing the trial of the action before a Judge with a jury, and that the time for giving notice of trial might be extended until seven days after this motion should have been disposed of.

The motion was heard before Mr. Justice *North* on the 2nd of December, 1887.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the Plaintiff:—

The Defendant has added to the counter-claim an issue that would have been the proper subject of an old Common Law action; it is therefore one which either party has a right, under rule 6 of Order XXXVI., to have tried with a jury, the Plaintiff has, therefore, a right to have the whole matter brought before a jury: *The Temple Bar* (1); *Coote* v. *Ingram* (2). If the Plaintiff has not a right to a trial by jury of the action the counter-claim may be sent before a jury on the issue relating to misrepresentation. A counter-claim is for many purposes a separate action: *McGowan* v. *Middleton* (3).

Napier Higgins, Q.C., and *Reginald Bray*, for the Defendant:—

The Plaintiff has commenced a Chancery action in this Division to which a purely Common Law issue has been attached, he has no right to have any part of it tried before a jury: *Gardner* v. *Jay* (4).

It would be extremely inconvenient to try this action otherwise than as a Chancery action; the issue of fraud in such a case as this is one well fitted for a Judge without a jury. Such an issue was common in old Chancery suits. The whole question is mixed up so that the Court will not exercise its discretion to send any part before a jury.

Cozens-Hardy, in reply:—

In *Gardner* v. *Jay* the plaintiff had chosen to mix up a Common Law claim with an equitable one in an action commenced

(1) 11 P. D. 6.
(2) 35 Ch. D. 117.
(3) 11 Q. B. D. 464.
(4) 29 Ch. D. 50.

in this Division, and he could not after that take the case before a jury; here the Plaintiff had no choice, the Common Law issue is forced upon him by the other side. In *Gardner* v. *Jay* (1) the plaintiff could have brought two actions.

NORTH, J.:—

This is a case in which the Plaintiff has brought an action asking for relief, for which it would be extremely inconvenient, to say the least, to go before a Judge and jury. It includes, among other things, the redemption of shares. The Defendant puts in a counter-claim, which also asks for relief for which it would be extremely inconvenient to go to a Judge and jury. But he does also ask for another thing, namely, damages in respect of a matter which might properly be the subject of a separate action for deceit. After that the Plaintiff applies to have the whole action, which I read as meaning the action and counter-claim, tried by a Judge with a jury as matter of right. In my opinion he has not any such right, and for this reason, that the Plaintiff's action is one assigned to the Chancery Division. When we look at the rules, Order XXXVI., rule 3, provides that "Causes or matters assigned by the principal Act to the Chancery Division shall be tried by a Judge without a jury, unless the Court or a Judge shall otherwise order." Therefore the action is to be tried without a jury unless a direction to the contrary is given. Then the rule on which the Plaintiff relies is rule 6 of the same Order. Before going to that, rule 4 provides for the trial of matters without a jury where desirable, which could before have been tried without a jury: and rule 5 also provides for the trial without a jury of matters requiring prolonged examination of documents, or scientific or local investigation. Then rule 6 says: "In any other cause or matter, upon the application within ten days after notice of trial has been given of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury." That is, in any cause or matter other than those comprised in rules, 3, 4, and 5. This action, for the reasons I have given, being one assigned to the Chancery Division, is within rule 3; it is not a cause or matter

(1) 29 Ch. D. 50.

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within rule 6. The Plaintiff's application, therefore, as matter of right, fails.

Then is it a case in which the discretion of the Court to order a trial with a jury ought to be exercised? In my opinion the matters in dispute are far better suited for being tried by a Judge without a jury than with one. There is, no doubt, a point raised on the counter-claim which might be made the subject of trial by jury. But there is no application to strike out that part of the counter-claim, or to have it tried at a different time or in a different way from that which the Orders require. Under those circumstances I do not see any reason to accede to the notice of motion, or direct that the action with the counter-claim; or the counter-claim alone, if that be the meaning of the notice of motion; shall be tried by a Judge and jury. The motion must be refused.

D. P.

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The Plaintiff appealed, and the appeal was heard on the 21st of December, 1887.

Cozens-Hardy, Q.C., and *Swinfen Eady*, for the appeal:—

We say that this is not a case of appeal from discretion, but that the Plaintiff is entitled *ex debito justitiæ* to have the action tried by a jury, for the counter-claim introduces the case of damages for fraudulent misrepresentations. Apart from that, we admit the case to be one proper for the Chancery Division. The rules bearing on the question are rules 3, 6 and 7 (*a*) of Order XXXVI., and by 6 we have a right to a jury.

[COTTON, L.J.:—Does not this action come within rule 3, though if damages had been the only question the case might have been one for a jury?]

The meaning of the rules cannot be, that matters for which a jury is the proper tribunal, shall be tried by a Judge without a jury, because they are mixed up in the same action with matters which can properly be so tried. The Judge thought that the case was governed by *Gardner* v. *Jay* (1), but we contend that it does not make against us. There the plaintiff had chosen the

(1) 29 Ch. D. 50.

Chancery Division, and combined his causes of action in an action commenced in that Court. He then wanted to have one of them tried by a jury. The case would be in point if the Defendant here was asking for a trial by jury and the Plaintiff resisting it. The counter-claim is for this purpose a separate action, and substantially it is an action for damages and nothing else, for it asks no other relief except what could be obtained in the original action. The object of the rules was to preserve to a party the right which he had before of having a question tried by jury: *The Temple Bar* (1). *Gardner* v. *Jay* (2) went on the ground that the party by his course of proceeding had waived that right.

Napier Higgins, Q.C., and *Reginald Bray*, for the Defendant:—

[COTTON, L.J. Was the discretion of the Judge exercised on the question whether this question of damages alone should be sent to be tried by a jury?]

No. The Plaintiff insisted, according to the terms of his application, upon his right to have the action tried by a jury.

[They were then stopped by the Court.]

COTTON, L.J.:—

This is an appeal by the Plaintiff from a refusal by Mr. Justice *North* of an application to have the action tried by a jury. If it was within the discretion of the Judge to grant or refuse a trial by jury we of course should not interfere. But the Plaintiff contends that under Order XXXVI., rule 6, he has a right to a trial by jury. Rule 6 says: "In any other cause or matter, upon the application . . . of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury." The rule does not say that any issue of fact which, if it stood alone, must be tried by a jury, shall be so tried, but that "in any other cause or matter," which excludes actions assigned to the Chancery Division, an order shall be made for a trial with a jury. The case, therefore, in my opinion, does not come within that rule, and it was wrong to apply to have the

(1) 11 P. D. 6. (2) 29 Ch. D. 50.

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action tried with a jury. The counter-claim is not only for damages, but extends to other matters assigned to the Chancery Division, so it cannot be treated as a claim not assigned to the Chancery Division. The Plaintiff, if he had come in time, might under Order XXI., rule 15, have had this counter-claim for damages excluded from the action and tried separately, on the ground that it cannot conveniently be tried in the action, and we ought not now, on the ground of exercising our discretion, to interfere as to its mode of trial. The Plaintiff, not having applied in the mode provided for by the orders, has brought the difficulty on himself. The appeal must be dismissed.

FRY, L.J.:—

I am of the same opinion, and will only add that Order XIX., rule 3, gives the Court power to disallow a counter-claim where in the opinion of the Court it cannot be conveniently tried in the pending action.

Solicitors for Plaintiff: *Saunders, Hawksford, Bennett & Co.*
Solicitors for Defendant: *Watney, Tilleard, & Freeman.*

H. C. J.

C. A. 1887 CHITTY, J. *Nov.* 25. C. A. *Dec.* 21.

DOWNING *v.* FALMOUTH UNITED SEWERAGE BOARD.

[1887 D. 1670.]

Practice—Affidavit as to Documents—Rules of Supreme Court, 1883, *Order XXXI., r.* 12.

Order XXXI., rule 12, was not intended entirely to alter the principles as to production of documents, but to give the Court a discretion to refuse the discovery of them when there was no reasonable prospect of its being of any use. On an application for an affidavit of documents evidence ought not to be entered into; the Court will form its conclusion from the pleadings, but any other proceedings in the action, as, *e.g.*, evidence used on a former occasion, may be looked at.

In an action to restrain a nuisance from sewerage works, the Plaintiffs, after notice of trial, applied for an affidavit as to documents in the possession of the Defendants relating to the matters in question in the action.

Chitty, J., refused the application, on the ground that it was not to be presumed that the Defendants had documents in their possession which would be material on the question whether there was a nuisance or not. The Plaintiffs appealed, and gave notice to read the affidavits filed on an application for an interim injunction, which were about thirty in number. From three of these affidavits it appeared that there had been resolutions passed by the Defendants bearing on the question of nuisance, and a correspondence between them and the Local Government Board on their proposing an alteration in their system of sewerage:—

Held, that *Chitty*, J., was right in refusing the general order asked for, but that these affidavits could be looked at on the question whether there was sufficient reason to suppose that there were no documents the production of which would be of any use, and an order was made for an affidavit limited to resolutions of the Defendants and correspondence between them and the Local Government Board.

Held, that the Plaintiffs ought not to have given notice to read all the affidavits, but ought to have pointed out the parts on which they meant to rely, and they were therefore ordered to pay the costs occasioned by the notice.

THIS was an action commenced in August, 1887, for an injunction to restrain the Defendants from continuing to discharge into a certain tank near the foreshore at *Falmouth* any sewage or offensive matter, and from keeping or maintaining any sewage or other offensive matter therein, or at all, so as to cause a nuisance and injury to the Plaintiffs.

The three Plaintiffs were occupiers of shops and dwelling-houses near the tank. The Defendants, who were the first sewerage board for *Falmouth*, constructed sewage works in 1873, and made the tank in question to collect part of the sewage, with a view of filtering and deodorizing it and discharging the filtered and deodorized water into the harbour. The Plaintiffs complained that the operations were so carried on as to cause a serious nuisance to the Plaintiffs' premises.

The Defendants alleged by their statement of defence that the works had been carefully constructed according to plans prepared by a competent engineer and approved by the Local Government Board after an inquiry held before an inspector appointed by the Home Office, and that, though the Plaintiffs were fully aware of the position in which the tank was to be, they never took any proceedings to prevent its construction, and were bound by acquiescence; that the houses of two of the Plaintiffs drained

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direct into the harbour and caused a nuisance; that during the past summer, which was unusually hot and dry, there had been an occasional slight discharge of sewage from the Defendants' drainage into the harbour, and that occasionally unpleasant smells arose from the harbour and the foreshore, and from the tank, but that such smells arose principally from the Plaintiffs' direct drainage into the harbour, and so far as they arose from the Defendants' drainage were too slight to be an actionable nuisance. Par. 8. That the Defendants had always endeavoured to conduct their works to the best advantage of the inhabitants, and that, on the Plaintiffs complaining to them, they instructed their engineer to report on their tanks and suggest any alteration which might meet the Plaintiffs' views, and that the Plaintiffs had been furnished with a copy of his report dated the 25th of July, 1887, and that the Defendants offered before action to take immediate steps to carry out his recommendations. That if this had been done the possibility of the Plaintiffs having any ground of complaint would have been removed, but the Plaintiffs refused such offer; that the Defendants, also before action, passed a resolution consenting to the nomination of an engineer to be approved of by the Plaintiffs, and that they would do what he recommended to abate any nuisance at the tank (except that they would not consent to the removal of the tank) subject to the approval of the Local Government Board; but the Plaintiffs would not accept this offer. Par. 9. That having regard to the above offers this action was unnecessary. Par. 10. That on the 7th of October, 1887, the Defendants passed a resolution for carrying out the report of the 25th of July, 1887.

On the 20th of October, 1887, the Plaintiffs gave notice of trial. After this they took out a summons asking that the Defendants might be ordered, within seven days after service of the order to be made thereon, to file a full and sufficient affidavit by their proper officer, stating whether they had or formerly had in their possession or power any and what documents relating to the matter in question in the action. This was refused by the Chief Clerk. The Plaintiffs thereupon gave notice of motion before Mr. Justice *Chitty* for such order. The application was heard on the 25th of November, 1887.

Sir *Arthur Watson*, Q.C., and *S. J. Fraser Macleod*, for the application.

Romer, Q.C., and *Bramwell Davis*, for the board.

CHITTY, J. :—

Apart from the allegations made in paragraphs 8 and 10 of the defence this action is one by which the Plaintiffs seek to restrain the Defendants from committing a nuisance by smell, and the only issue apart from these special allegations is nuisance or no nuisance. That is a mere question of fact.

Under these circumstances the Plaintiffs asked for an affidavit of documents from the Defendants, and they ask for that under rule 12, Order XXXI. I have pointed out during the argument that parts of the rule are entirely changed, and it is unnecessary that I should go through the history of the rules. The result of the rule as it stands now is that the Court or Judge has a discretion. The Court may either refuse or adjourn the application, or may, in the exercise of its discretion, limit the order to certain classes of documents and so forth. Without going through the exact words of the rule, it is sufficient to say that it gives a discretion to the Judge which he must exercise in each particular case. I am not going to lay down any general rule, because I think where there is a discretion given it is meant that the discretion should be exercised with reference to the facts of each particular case. Speaking for myself, I think it is prejudicial to the exercise of that discretion for a Judge unnecessarily to lay down any special rule with regard to the exercise of his discretion, because it becomes in course of time no longer a discretion, but a discretion to be exercised, if I may say so, in accordance with a discretion exercised by Judges in other cases. I have listened with attention to the argument of Sir *Arthur Watson*, the Plaintiffs' counsel, and I also had the benefit of a short argument from his learned junior in Chambers, and I am unable to discover on what ground they ask me to exercise this discretion affirmatively as against the Defendants. The result is this. It is suggested on the part of the Plaintiffs that the Defendants may have some documents in their possession whereby it would appear

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that the Defendants have admitted that there is a nuisance. If I were to act on that alone the rule might just as well never have been amended, and have been left in its former state, because that would be equivalent to saying that in every case the defendant may have some documents shewing an admission, and therefore the order ought to go for an affidavit of documents. I have looked at the nature of the case and the nature of the pleadings, and I am entitled to consider them. Exercising my discretion on that ground merely, which is the only one put forward, namely, that the Defendants may have some admissions among their documents that this is a nuisance, I think that is altogether insufficient, and I decline to act upon it. I cannot see in such a simple case as that which I have stated that there is any reason why I should exercise my discretion so as to, as it appears to me, increase the expense. I quite agree that discovery is very valuable in proper cases, whether by interrogatories or otherwise, or by affidavits of documents, if it limits the expense, because sometimes the parties are by means of the discovery enabled to restrict their evidence to certain points, and they have enough on the documents or in the answers to interrogatories which have been obtained from the other side to support their case without further evidence. Those considerations have no application to the present case. I can find no ground therefore on which I should in exercise of my discretion accede to the application. What I have now said is in reference to the general question, but the Defendants in their defence have put in certain allegations in paragraphs 8 and 10, to which I must refer. I do not desire to criticise those statements at the present moment, but the substance of them I understand is this—that they made an offer before action to do certain things, which if done, although not said to be done, beforehand would put an end to the Plaintiffs' case as regards the nuisance, that is to say would remove the nuisance if there was a nuisance. But the nuisance itself is denied in the earlier part of the defence. These paragraphs therefore may go to this, that if there is an injunction granted against the Defendants they ought to have further time. They say they have always desired to mitigate or put an end to the nuisance, and that statement of course is founded upon there

being a nuisance, not admitting that there is, but if there should be one, then they say they have acted reasonably before action brought. I say no more about the effect of those paragraphs, and I am only stating the effect of them for the purpose of explaining what I do on this occasion with reference to the affidavit of documents which is asked for. Now in these paragraphs certain documents are mentioned, such as an engineer's report, and a resolution which was passed, and there may be some others, but with regard to those documents which are mentioned the Plaintiffs are entitled to see them and can get them under an entirely different procedure if they desire to have them discovered, but the allegations in substance are that these documents have always been communicated to the Plaintiffs, and that no special case is made with regard to them. In refusing the motion, as I do, I am not in any way prejudicing the Plaintiffs as regards making any proper application with reference to the documents here mentioned if the statements are true; about that I know nothing. Very possibly the result may be that the Plaintiffs do not want them for the best of all reasons, because they have got them; but if they have not got them and want them, there is a well-known procedure under Order XXXI. by which they can certainly get them. The result is that I cannot find any ground for saying that the discretion was wrongly exercised in Chambers. I am always willing, as I say, when a motion is made to deal with an order made by myself in Chambers to reconsider the matter. It is very advantageous that I should have the opportunity of doing so in Court, because frequently when the matter is one of importance the parties wish to go to the Court of Appeal, and I understand this case may be taken there. It is important, therefore, for the Judge to consider or reconsider fairly what he has done, and it is useful for him to state his opinion, as I am doing, so that the Court of Appeal may know the reasons on which I have acted. I really acted on the same grounds myself in Chambers, although there was not so much discussion. The result is that I refuse the motion with costs, but not to be paid now.

G. M.

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The Plaintiffs appealed and gave a notice as follows: "We shall, if necessary, on the hearing of our appeal motion herein read the evidence filed on the motion before the Vacation Judge for an interim injunction." The Defendants replied that they should object to such evidence being read, as it had not been before the Court below.

The evidence on the application for the interim injunction consisted of about thirty affidavits, the bulk of which were simply on the question of the fact of nuisance, and had no reference to documents. Among them, however, were an affidavit by a short-hand writer and reporter for a newspaper verifying a report of a meeting of the board on the 19th of July, 1887, at which a resolution was passed that a letter should be written to the solicitors of the Plaintiffs stating that the board was as anxious as they were to abate the nuisance. From two other affidavits it appeared that the Defendants had applied to the Local Government Board to sanction a loan for further works which would bring more sewage into the tank, and that the Local Government Board, after a report from their inspector in 1885, had refused their consent.

The appeal was heard on the 21st of December, 1887.

Sir *Arthur Watson* Q.C., and *S. J. Fraser Macleod,* for the Appellants:—

The Judge declined to make any order because he thought that he could not presume, and we had no evidence to shew, that there were, or were likely to be, any documents that could help our case. We have now given notice to read the affidavits filed on both sides on the application for an interim injunction which do shew it. The case, therefore, is not one of an appeal from the discretion of the Judge.

[COTTON, L.J.:—Is it the practice now to go into evidence on both sides on an application for an affidavit as to documents?]

Under Order XXXI., rule 12, the making an order is discretionary, and evidence therefore may be held to be necessary.

[COTTON, L.J.:—No; the pleadings will shew whether the

issues are such that the existence of documents bearing upon them is to be presumed.]

We submit that Mr. Justice *Chitty* carries the general order too far, and that its intention was not to give the Judge a discretion to be exercised affirmatively only when he saw reason to think that there were documents, but only to give him a discretion to refuse vexatious applications for documents when no good was to be expected from their production. *Martin* v. *Spicer* (1) raised a similar point of principle. Here the resolutions passed at meetings of the Defendants, and communications between them and the Local Government Board which are shewn by the affidavits to have taken place, are very likely to contain evidence which may help us on the question of nuisance.

[COTTON, L.J. :—I think it was not intended that a conflict of affidavits should be entered into on these applications, but still I am of opinion that any affidavits previously used may be looked at.]

Romer, Q.C., and *Bramwell Davis*, for the board:—

[COTTON, L.J.:—Do you object to filing an affidavit specifying any resolutions of the board admitting or tending to shew that the Defendants' sewerage works were a nuisance, and the correspondence with the Local Government Board as to sewerage?]

We do not object to make an affidavit of that kind if it makes no difference as to costs. We say that the Judge has exercised his discretion, and that his order could not be interfered with adversely. As to costs, we were never asked to make an affidavit of this kind, the Plaintiffs have pressed for an affidavit in the general form mentioned in their summons, viz. an affidavit as to all documents in their possession relating to the matters in question in the action, which, having regard to the nature of the issue, would be oppressive. The Plaintiffs, at all events, ought to pay the costs of their notice to read the affidavits: the Defendants have had to deliver a brief of thirty, of which only three have any bearing on the question now before the Court.

Sir *A. Watson*, in reply.

(1) 32 Ch. D. 592.

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COTTON, L.J.:—

This is an appeal by the Plaintiffs from a decision of Mr. Justice *Chitty* declining to order the Defendants to make an affidavit as to documents under Order XXXI., rule 12. The Plaintiffs have given notice to read on the appeal a mass of affidavits filed on a previous interlocutory application. The Court ought not to be called upon to consider a mass of affidavits on the question whether a defendant is likely to have in his possession documents to the production of which the plaintiff is entitled, and I think that the new rule was not intended entirely to alter the principles as to production of documents, but only to give the Court a discretion to refuse discovery of documents where it can see that no good is reasonably to be expected from ordering it. How is that to be ascertained? By looking at the pleadings. The pleadings shew what questions have to be tried, and the nature of those questions will shew whether there is good reason for coming to the conclusion that a production of documents cannot be expected to be of any use. The Court ought not to require affidavits on the point; but, if evidence has been previously taken, the Court may look at it to inform its mind as to whether there is any prospect of production of documents being useful. I think that Mr. Justice *Chitty* was right in considering that as the question in the action is nuisance or no nuisance, there would be no use in a general production of documents, and I think he was right in declining to make a general order such as was asked for, which would result in scheduling a mass of documents that could not be of any use to the Plaintiffs. We can, however, look at any proceedings in the action, such as, for instance, these affidavits, to see whether they suggest the existence of documents the production of which may be serviceable. But general notice to read them should not have been given. The Plaintiffs should have called attention to those affidavits on which they meant to rely as indicating the existence of documents which ought to be produced, and have given notice of reading them only. Our attention has been called to resolutions of the board, which possibly may furnish evidence sufficient to establish the fact of the existence of an actionable nuisance, and may save the Plaintiffs the expense of going into evidence about

it; and we have also been referred to communications with the Local Government Board which may have the same effect. I think, therefore, that we ought to require the Defendants to file an affidavit as to books or documents in their possession containing resolutions of the Defendants during the years 1885, 1886, and 1887 admitting, or tending to shew, that the Defendants' system of sewerage was or is creating a nuisance; also as to correspondence between the Defendants and the Local Government Board during the same period, relating to the Defendants' system of sewerage. The Defendants to be at liberty to raise any question of privilege as to any of the documents.

As regards the costs, the Plaintiffs, in my opinion, were wrong in proceeding on the idea that affidavits are to be filed on these applications, and in giving a general notice to read all the affidavits, instead of calling the attention of the Defendants to the fact that the existence of documents material to the Plaintiffs' case was suggested by three of the affidavits. Instead of referring to these three short affidavits, they give notice to read the whole mass. The Plaintiffs must pay all the costs occasioned by their notice to read those affidavits; the other costs here will be costs in the action. We do not interfere with the order below as to costs.

FRY, L.J.:—

I am of the same opinion.

Solicitors for Plaintiffs: *Downing, Holman & Co.*, agents for *Downing & Handcock, Cardiff.*

Solicitors for Defendants: *Rowcliffes, Rawle, & Co.*, agents for *Jenkins, Falmouth.*

H. C. J.

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1887
Nov. 1, 2, 3, 5;
Dec. 6.

In re HENDERSON.
NOUVION *v.* FREEMAN.

[1883 H. 2042.]

Foreign Judgment.

According to the law of *Spain* a person in whose favour documents of a certain class have been executed can commence "executive" proceedings in which the defendant can only plead defences not disputing the original right of action, and the plaintiff, if successful, obtains a "*remate*" judgment which is an order for execution to issue for a sum of money and costs. A "*remate*" judgment does not preclude either party from taking "plenary" or "ordinary" proceedings as to the same subject-matter, and in such ordinary proceedings all defences are open, and neither party can set up the "*remate*" judgment as a *res judicata*, or even as giving him a *primâ facie* case, and the rights of the parties are not affected by it. The plaintiff can, however, on giving security enforce the "*remate*" judgment though plenary proceedings are pending:—

Held, reversing the decision of *North*, J., that a "*remate*" judgment, as it did not, according to the law of *Spain*, decide the rights of the parties, was not a final and conclusive judgment which could be sued upon in this country, and did not enable the Plaintiff to maintain a suit here for administration of the estate of the Defendant in the executive proceedings, who had since died.

THIS was an appeal by the Defendants from a decision of *North*, J. (1), that a judgment in *Spain* of the 5th of April, 1878, was a judgment on which, apart from fraud, the claim of the Plaintiff as a creditor to have the estate of *W. Henderson* administered could be sustained.

The judgment was what is termed in Spanish law a "*remate*" judgment obtained in "executive" proceedings. The nature of these proceedings is set forth in the report below and in the judgments. It may be shortly stated that they can be taken only upon documents of particular characters executed in favour of the plaintiff, and that certain defences only can be taken by the defendant, being defences not disputing the original cause of action. The judgment given, if the plaintiff is successful, is that execution do issue for a certain sum of money and

(1) 35 Ch. D. 704.

costs. A judgment in "executive" proceedings does not preclude either party from commencing "ordinary," or "plenary," or "declarative" proceedings in respect of the same subject-matter. In such ordinary proceedings all defences are open and the judgment in the executive proceedings cannot be relied on for any purpose by either party, though if the plaintiff has obtained judgment for execution he may, on giving security, enforce it, notwithstanding the pendency of the plenary proceedings.

Mr. Justice *North*, held, that the "*remate*" judgment was a final judgment which could be sued upon in this country. The Defendants, the executors of *Henderson*, appealed, and the appeal was heard on the 1st, 2nd, 3rd, and 5th of November, 1887.

Rigby, Q.C., *Kenelm E. Digby*, and *Davenport*, for the Appellants:—

The evidence of the Spanish lawyers shews that a "*remate*" judgment in *Spain* is not a final and conclusive judgment for any purpose. It does not define the rights of the parties, it is a mere interim order making a party pay what it is probable he will have to pay, without deciding that he will ultimately have to pay it, or that the plaintiff will have a right to retain it. If plenary proceedings are taken for ascertaining the rights of the parties the "*remate*" judgment is not looked at in them. There was, formerly, some obscurity as to the principle of our enforcing foreign judgments, but the law is settled by *Godard* v. *Gray* (1) and *Schibsby* v. *Westenholz* (2). The judgment to be enforced here must be final and conclusive, which this judgment is not.

Napier Higgins, Q.C., and *Yate Lee*, for the Respondent, relied on the grounds taken by Mr. Justice *North*.

1887. Dec. 6. COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *North* on the trial of an issue which had been directed by the late Mr. Justice *Pearson*, in an action by a creditor who has sought to rely upon a judgment obtained by him in *Spain*; and the question which had to be decided on the issue was whether it was such a judgment

(1) Law Rep. 6 Q. B. 139. (2) Law Rep. 6 Q. B. 155.

C. A. 1887 *In re* HENDERSON. NOUVION *v.* FREEMAN. Cotton, L.J.

as would entitle the Plaintiff in the action to rely upon it as a cause of action in *England*.

The judgment was what is called in *Spain* a "*remate*" judgment. Whether that means a closing judgment or not I do not know, apparently it does. The judgment, however, and the proceedings in which it was obtained were certainly of a very peculiar character.

According to the law of *Spain* a man in whose favour documents of a particular character have been executed is entitled to institute what are called in *Spain* executive proceedings, in which he may obtain a judgment such as that relied upon by the Plaintiff.

In the present case the deceased, Mr. *Henderson*, had executed in favour of the Plaintiff, *Nouvion*, two documents of such a character that the Plaintiff was entitled to institute an executive proceeding in order to obtain against him the judgment which he has obtained. It is not suggested there was any irregularity in the proceedings or in the obtaining of that judgment.

Now what are "executive" proceedings? They are proceedings so called in order to distinguish them from other proceedings in *Spain* which are called "ordinary," or "plenary," or "declarative." In the ordinary, plenary, or declarative proceeding every defence which can be taken is open to the defendant, but in the executive proceedings the only defences which can be taken by the defendant are defences which admit the original right of action on the document which is sued upon, and although certain defences can be pleaded by the defendant, and can be considered, yet they are only of this nature—that the plaintiff has lost his original right of action, either by a contract not to proceed, or in consequence of payment, or of his having released his cause of action. The grounds of defence, therefore, are very limited. And we find in the evidence (of which there is a good deal on both sides) that a judgment obtained in an executive proceeding can never be relied upon to found a plea of *res judicata*, that is to say, it is no bar in any other proceeding. Not only so, but, if the defendant or the plaintiff in the executive proceedings is dissatisfied with the result, he can take proceedings in the plenary or ordinary jurisdiction and the judgment

which has been obtained is no defence and no *primâ facie* ground of action.

It is stated in the evidence taken on behalf of the Defendants, and it is not in any way contradicted by the evidence on behalf of the Plaintiff, that the rights of the parties with reference to the original cause of action are in no way affected by any judgment obtained in the executive proceedings. In the evidence on behalf of the Defendants are quoted two articles in the Code which are clear: "The judgment passed in the executive judicial courses does not produce the exception of a matter decided" (that is to say, it cannot be used as a plea of *res judicata*) "the parties being left in the free possession of their rights to proceed with the ordinary course on the same question." And, then, art. 972 is this: "Whatever may be the judgment which may put an end to this judicial proceeding" (that is the executive proceeding) "both the plaintiff and the defendant have their rights left free to proceed with the ordinary course." It is also on the evidence that even matters which were capable of being brought forward in the executive proceeding, and which were so brought forward, can be tried over again just as if there had been no judgment upon them in the executive proceeding.

Now such a judgment strikes one as not likely to be a good cause of action in a foreign country. But it was argued that it merely comes to this—that such a judgment is like a judgment in an old action at law which would be liable to be interfered with by proceedings in Equity to impeach it upon equitable grounds. In my opinion there is no analogy between the two cases. The Common Law action was in a Court which could not take cognisance of any equitable grounds of defence, and the judgment at law was conclusive as to the legal right, a Court of Equity neither impeached nor disregarded it, but on equitable grounds prevented a party from availing himself of it. This has no analogy to a judgment in executive proceedings, which can in no way be relied upon as giving to the plaintiff who has obtained it a ground of action, or to the defendant who has obtained it a defence against other proceedings. If we look at the judgments which are sought to be made the cause of action in the present proceedings, they, in my opinion,

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support the view to be arrived at on the evidence, for, as far as I can construe them, they do not in any way purport to decide any question between the parties, but merely to give a right to the plaintiff in the action to get execution on the assumption that he has got a good cause of action by the document on which he sues.

Mr. *Yate-Lee*, who argued the points very fully, said that there were three judgments upon which he relied, and he particularly pressed upon us the letter of request sent by the Spanish Court to the judicial authorities in *England* and in *Scotland*, requesting the Judges in the English and Scotch Courts to enforce the order which had been made by the Spanish Court. But that is no judgment. It merely proceeds on the footing of what has been already done in *Spain*, and requests the Courts in this country to give effect to those proceedings and to the orders which had been obtained. There are two such orders, one of them made in December, 1874, and the other on the 5th of April, 1878. But when we look at them they do not purport on their face in any way to decide any question between the parties so as to determine their rights under the original agreement. The first one (that of December, 1874) is this: "Let an order of execution be issued against the property and goods of Mr. *William Henderson* and Mr. *William Percival Partington*, the first an inhabitant of *Glasgow*, in *Scotland*, and the second of *Madrid*, at present residing in *London*, for the principal amount of —— reales, and also for the amount of the legal interest thereon." That does not purport to decide between the parties any question which may arise on their contract, it is only an order giving a right of execution against the property in *Spain* of the defendant. In the judgment of the 5th of April, 1878, the Judge says: "I decree that I ought to order, and I do hereby order, that the distraint is to be carried into effect, and in virtue thereof that sale and auction of the property sequestrated be made, and that with the proceeds thereof entire and complete payment be made to the executive plaintiff of the amount of principal sought, interest due and to become due, until the payment and effective discharge with costs, in which the defendant is condemned." That order, proceeding on the assumption, which the defendant is not at liberty to dispute, that there is due this sum

from the defendant to the plaintiff, is an order simply giving execution against the goods and property of the defendant. As far as we can learn, the material question now between the parties is whether the Plaintiff can by virtue of that judgment get rid of any obstacle under the *Statute of Limitations* to his suing on the original contract.

It has been urged, and the judgment in the Court below seems to go on that ground, that it would be reasonable to let the *remate* judgment be considered *primâ facie* evidence of the Plaintiff's right to have a decree, and that he should therefore be allowed to sue upon it subject to any objections which the Defendants may take, so as to shew that it does not give effect to the true rights of the parties, and it was said that this is what would happen in *Spain*, viz., that the Defendants would only be at liberty to get rid of the *remate* judgment by taking plenary proceedings. But, as I have already said, those plenary proceedings are not proceedings to impeach the *remate* judgment. They are entirely independent proceedings, and in them the defendant and plaintiff are both of them at liberty to obtain, without regard to the *remate* judgment, a decision on matters which have been already discussed, and, so far as they could be, have been made the subject of decision in the executive proceedings. To give effect, therefore, in this country to a *remate* judgment, would enable the Plaintiff to obtain in this country a greater benefit from it than he could obtain from it in *Spain*. It would be entirely contrary to the principle on which English Courts proceed in enforcing a foreign judgment, if we were to adopt that course. When a foreign judgment is made a cause of action in *England*, the defendant, though he is at liberty to shew that the Court had no jurisdiction, or that the judgment was obtained by fraud, cannot enter into the question whether the judgment was obtained on a right view of the law, even though the law may be the law of *England*. This is strongly shewn by *Godard* v. *Gray* (1), in which both parties in a foreign Court had proceeded on a wrong assumption as to the effect which would be given in *England* to a particular document; but the Court would not allow that question to be gone into so as to shew that the judgment on

(1) Law Rep. 6 Q. B. 139.

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which the plaintiff founded his cause of action was an erroneous judgment. In my opinion that is an absolute and conclusive answer to the suggestion that this judgment (which admittedly can be displaced by plenary proceedings in *Spain*) ought to be allowed as giving a *primâ facie* right of action in this country.

What is required in *England* in order that a foreign judgment may be sued upon here as giving a good cause of action? A foreign judgment does not, in the view of an English Court, merge the original cause of action, but if the party likes to proceed here on his original cause of action, he may do so, notwithstanding the foreign judgment. If he elects to proceed on the foreign judgment, then he must shew that the matter has been adjudicated upon by a competent Court, and that the adjudication is final and conclusive.

Now, in so stating the law, I do not think that I at all differ from the law as laid down by Mr. Justice *North*. Amongst other authorities he quotes (1) what was said in the case of *Paul* v. *Roy* (2) by the then Master of the Rolls (3): "It has not been questioned, and I have no doubt, that this Court has jurisdiction to enforce a foreign judgment, and, in ordinary cases, when the parties to them are here, to enforce the rights and obligations arising out of contracts entered into in foreign countries. But the first question to be considered is, whether this is a final foreign judgment adjudicating on the rights of the parties litigant here, because, I conceive, it would be new in practice for this Court to enforce a foreign judgment, unless it were final and conclusive." And (4) Mr. Justice *North* quotes the passage from the judgment of Lord *Blackburn* in *Godard* v. *Gray* (5); in which Lord *Blackburn* quotes this passage from the judgment of Baron *Parke* in *Williams* v. *Jones* (6): "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained." Mr. Justice *North* quotes those passages, and he agrees with the law as laid down by those decisions.

(1) 35 Ch. D. 717.
(2) 15 Beav. 433.
(3) Ibid. 439.
(4) 35 Ch. D. 714.
(5) Law Rep. 6 Q. B. 139, 148.
(6) 13 M. & W. 633.

Now, first of all, was this judgment final? I think there is a little misapprehension as to what is meant by the word "final." We require a foreign judgment to be a final one, that is to say, it must not be merely what we should call here an interlocutory order, an order not purporting to decide the rights of the parties, but merely requiring something to be done pending the prosecution of the action, either for the purpose of security or of keeping things as we say *in statu quo* until the trial of the action. Is this *remate* judgment final? Mr. Justice *North* thought it was, but I think that is an erroneous view of the word "final" as applied in English Courts to a judgment which can be sued upon. It was final in this sense, that it was an end of the executive proceedings, and moreover it could not be suspended, if security was given by the Plaintiff, in consequence even of an appeal, or of any plenary proceeding; but it was not final in the sense of its being a decision as to the rights of the parties, for, as I have said, in executive proceedings there can be no binding final decision as to the rights of the parties.

Then was there here an adjudication? That is required according to what is stated by Lord *Romilly* and Lord *Bramwell* in the passages to which I have referred, and such I understand to be the law of *England*. In my opinion there was not, because the *remate* judgment did not purport to decide, and it was not possible to decide in these executive proceedings, any question arising as to the validity of or the rights flowing from the original obligation. Therefore there was no adjudication at all, except a decision according to the practice allowed in the Spanish Courts, that on that document not impeached leave should be given to the Plaintiff in the executive proceedings to issue out execution as against the property of the person who had bound himself by the instrument sued upon. I think Mr. Justice *North* considered it was to be treated as an adjudication, and as therefore deciding the matter, in consequence of some evidence which he refers to. At p. 714 of the report he says: "It struck me at one time that the judgment of the 5th of April, 1878, merely directed execution to issue against *Henderson's* goods, and did not amount to a personal judgment against him for payment, but this difficulty is removed by the evidence, as all the witnesses on both sides agree

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that the effect of that *remate* judgment was, according to the law of *Spain*, to make *Henderson* personally, and his estate in the hands of his executors, responsible for the payment of principal interest, and costs."

Now undoubtedly, both in the evidence for the Plaintiff and for the Defendant there are passages which say that the judgment bound the Defendant personally, and that his executors are also bound to the extent of the assets which came to their hands. In the Defendant's evidence I find this: "To the third cross-question, I answer the said judgments made the Defendant personally liable for the sum for which execution was ordered against him." Then there is a similar passage further on in the Defendant's evidence: "Mr. *Henderson* became responsible for the payment of the amount for which the execution was ordered against himself:" and then the Plaintiff's evidence says that the executors are answerable to the extent of the goods which came into their hands. Now if we had that evidence alone, it would be difficult not to assent to what is laid down by Mr. Justice *North*, but we must read it together with the rest of the evidence, and we find that there was not and could not be in executive proceedings any decisive adjudication of the matter. What I think is meant in those passages is this, that so long as no plenary proceedings are taken which decide the rights of the parties contrary to the judgment in the executive proceedings, neither the defendant nor his executors to the extent of the assets come to their hands can object to his goods being seized, and being made answerable for the amount for which execution is directed to be levied.

In my opinion, therefore, we ought to come to the conclusion that this is not such a judgment as the law of *England* will allow to be made a cause of action, so as to found on it alone a proceeding in this country.

Therefore, in my opinion, the decision ought to be reversed, and we ought to answer the question which is raised by the issue in the negative.

The judgment before us is: "The Court doth decide in favour of the Plaintiff, and doth find that the judgment or decree dated the 5th of April, 1878, in the amended statement of claim men-

tioned, is a judgment or decree upon which the claim of the Plaintiff can (apart from the question of fraud) be sustained." I think we ought to reverse that, and decide in favour of the Defendant that neither the judgment of April, 1878, nor that of December 2, 1874, are judgments or decrees upon which the claim of the Plaintiff can be sustained.

LINDLEY, L.J.:—

The Plaintiff in this case claims, as a creditor of a Mr. *Henderson*, deceased, to be entitled to the usual judgment for the administration of his estate.

The Plaintiff bases his claim on certain orders or judgments obtained by him in *Spain* against *Henderson* in his lifetime, and which judgments and orders the Plaintiff contends entitles him to rank as a creditor in this country against *Henderson's* executors.

The substantial question raised by the Plaintiff's claim is whether the Spanish orders or judgments are of such a kind as to be a foundation for an action in this country. The Plaintiff purposely does not sue in this country on any contract or cause of action anterior to the orders or judgments obtained by him in *Spain*. The Plaintiff sues on those orders and judgments, and contends that they are of themselves sufficient to entitle him to maintain an action in this country. Mr. Justice *North* has decided this question in the Plaintiff's favour, and from that decision the Defendants have appealed.

In the first place it is necessary to understand exactly the nature and effect of the Spanish orders or judgments which the Plaintiff has obtained in *Spain*, and on which he sues in this country. A full account of them will be found in Mr. Justice *North's* judgment (1).

The principal judgment or order sued upon is dated the 5th of April, 1878. The others are either preliminary or ancillary to that, and without dwelling upon them it is enough to say that they cannot from any point of view be regarded as more favourable to the Plaintiff than the main order or judgment of the 5th of April, 1878. That order or judgment is technically termed

(1) 35 Ch. D. 710

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a *remate* judgment, and is of a very peculiar nature. It is in effect an order for execution to issue for a certain sum of money with interest and costs. It is an order made in what we should call a summary proceeding—it is made on the production of documents executed in the presence of and attested by a notary public and *primâ facie* entitling the plaintiff to be paid the sum demanded. The defendant in that summary proceeding can avail himself of any defence he may have which is consistent with the document sued upon, *e.g.*, he can defend himself by proving that he has paid the sum demanded, or has been released but he is not at liberty to dispute the execution of the document nor to impeach it on the ground of fraud, misrepresentation, failure of consideration, or the like. A *remate* judgment or order can be appealed from, but except in that respect it is final and conclusive between the parties in the summary proceeding in which it is made.

But on the other hand a *remate* judgment decides nothing as to the rights of the parties. If the plaintiff fails in the summary proceeding he can bring a plenary action, and the decision against him in the summary proceeding is no bar to such action. If the plaintiff succeeds in the summary proceeding, and recovers a *remate* judgment, the defendant can nevertheless bring a plenary action, and have the rights of the parties determined, and the *remate* judgment is no bar to such action. In short, the *remate* judgment, whether in favour of the plaintiff or against him, is not *res judicata*, nor does it extinguish the original cause of action which the plaintiff may have had against the defendant or *vice versâ*. This is plain from the Spanish Code of Civil Procedure and from the evidence of the Spanish lawyers called on both sides. Their evidence also shews that no action can be brought in *Spain* on any foreign judgment which is not *res judicata* according to the law of the country in which it was pronounced.

The fact that a *remate* judgment is not *res judicata* by the law of *Spain* is, in my opinion, all important in the present controversy.

The next point for consideration is, can a *remate* judgment be the foundation of an action in this country? In my opinion it

cannot, for the simple reason that such a judgment does not decide, or purport to decide, the rights of the parties. Not amounting to *res judicata* in *Spain* it cannot be regarded as *res judicata* here. There is no authority for saying that an action will lie in this country on a foreign judgment which is not *res judicata* in the country in which that judgment is pronounced. The authorities are really all the other way. The cases collected in 2 *Sm.* L. C. in the notes to *Doe* v. *Oliver*, shew that no action can be brought in this country on a foreign judgment unless, if not appealed against, it is final and conclusive in the country in which it is pronounced. The fact that a judgment or order may be appealed from, or that it is made in a summary proceeding, does not prevent it from being *res judicata* and actionable in this country. But an order or judgment which decides nothing as to the true rights of the parties is not final and conclusive in the sense in which those words are used in the authorities referred to. Thus in *Paul* v. *Roy* (1), where money was ordered by a Scotch Court to be paid into the Scotch Court, the order was held not to be final and conclusive.

The evidence of the Spanish experts goes to shew that the *remate* judgment imposed upon *Henderson* a personal obligation to pay the sum claimed by the Plaintiff, and this point was much relied upon by the Plaintiff's counsel. In one sense I think it is shewn that an obligation to pay, *i.e.*, to hand over the money in dispute, was imposed by the *remate* judgment. But the obligation thus imposed was not an obligation to pay in satisfaction of an established debt or demand, it was simply an obligation to hand over the money, the right to it when handed over being left open and undecided.

The test of finality and conclusiveness of any judgment is to be found in the view taken of it by the tribunals of the country in which it is pronounced, and if a judgment leaves the rights of the parties uninvestigated and undetermined, and avowedly leaves those rights to be determined in some other proceeding, the judgment cannot be treated here as imposing an obligation which our tribunals ought to enforce.

The tribunals of this country go further than any others in

(1) 15 Beav. 433.

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enforcing foreign judgments. But English Courts have never yet gone so far as to recognise as a good cause of action a foreign judgment obtained in a proceeding in which the rights of the parties have not been, and could not have been, investigated or determined. Such judgments are provisional and not final, although it may be true that they must be obeyed, and are final to that extent, just like an order to pay money into Court to abide the result of further inquiry.

The principle on which an action can be brought on a foreign judgment is that the rights of the parties have been already investigated and determined by a competent tribunal, or that if such rights have not been in fact investigated and determined, it is because the parties, or one of them, have made default and not availed themselves of the opportunities afforded them by the foreign tribunal. In an action on a foreign judgment not impeached for fraud, the original cause of action is not re-investigated here, if the judgment was pronounced by a competent tribunal having jurisdiction over the litigating parties: *Godard* v *Gray* (1); *Schibsby* v. *Westenholz* (2). The judgment is treated as *res judicata*, and as giving rise to a new and independent obligation which it is just and expedient to recognise and enforce.

A *remate* judgment is not, in my opinion, like an old common law judgment against which the defendant could have obtained equitable relief in the old Court of Chancery. The common law judgment decided the legal rights of the parties and was *res judicata*, and was so treated by the Court of Chancery, which nevertheless gave relief against it on equitable grounds. The *remate* judgment decides no rights. It is based upon an assumption of liability made for the purpose of a particular form of procedure and of that only. The judgment is in no sense *res judicata*, and the analogy between a Spanish *remate* judgment and an old common law judgment fails in the most material particular.

But although the *remate* judgment does not decide the liability of the defendant to pay the principal sum or interest claimed by the plaintiff, it is contended that it imposes on the defendant

(1) Law Rep. 6 Q. B. 139. (2) Law Rep. 6 Q. B. 155.

a liability to pay the costs of the proceedings instituted by the plaintiff, and that the plaintiff is a creditor for the amount of those costs, and as such is entitled to an administration judgment. It appears to me, however, that the liability to pay these costs depends on the liability to pay the principal sum claimed, and that until this is determined the order for costs cannot be regarded as final or conclusive so as to serve as the foundation of an action.

Upon these grounds the Plaintiff cannot in my opinion sustain his action on the *remate* judgment. He must fall back on his original contract, and if his remedy on that is barred by the *Statute of Limitations* he will be without redress unless he can avail himself in *Spain* of the order of April 1878.

The orders appealed from must be discharged and judgment on the issue raised be entered for the Defendants with costs here and below.

LOPES, L.J. :—

The question is whether this action brought on a Spanish *remate* judgment of April, 1878, obtained upon two notarial instruments in accordance with Spanish law dated, respectively the 15th of April, 1872, and the 19th of October, 1872, will lie. A foreign judgment to be a good cause of action in this country must be given by a Court of competent jurisdiction and be final and conclusive in the country where it was pronounced. It must be an adjudication of the rights and liabilities of the parties.

Apply this doctrine to the present case: the Spanish *remate* judgment sued on, to afford a good cause of action, must be given by a Court of competent jurisdiction in *Spain*, and must bind the liabilities of the parties upon the original contract.

It is only necessary to deal with the judgment of 1878. That judgment was pronounced in summary proceedings in a District Court of the city of *Seville*. The summary proceedings in question are called executive. There are two kinds of proceedings, summary or executive proceedings and plenary, also called declarative or ordinary proceedings. In the former, upon proof of a *primâ facie* case, the Judge without notice to the debtor makes an order for execution against the defendant by attaching

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his property. Notice of attachment is given to the debtor and he is cited to appear, and may appear and put in his defence. It is not every defence however which he can plead; he can plead payment, want of consideration, fraud, release, compromise, and other defences in the nature of confession and avoidance, but he cannot set up any defence that puts in issue the contract itself, the validity of which is assumed in summary proceedings.

If the plaintiff is right the Court pronounces what is called a *remate* judgment directing execution to issue. From this judgment there is an appeal to the Court of Appeal, but none to the Supreme Court or Court of Cassation.

If the defendant has a good defence to the plaintiff's claim which is not available by way of answer in the summary proceeding he may commence a plenary or ordinary proceeding of his own triable before the same judge, and in this every legal answer to his opponent's claim is available, and he may test in every way the validity of the contract or instrument upon which he is sued. In such an action no plea can be set up of *res judicata* founded on the judgment in the summary proceeding. In the plenary action also any points already set up, even unsuccessfully, by a defendant in the summary action may be again set up and relied upon.

It seems to me unnecessary to state more than this to shew that this *remate* judgment is not a final judgment adjudicating on the rights and liabilities of the parties here litigant.

Suppose the Plaintiff had sued in this country not on the *remate* judgment but on the original cause of action, could this judgment have been set up as an answer on the ground of its being *res judicata?* It is clear it could not. It would be contended successfully that there had never been any adjudication of the rights and liabilities of the parties. Again, if the defendant in the *remate* judgment had instituted plenary proceedings in *Spain*, it is clear the *remate* judgment would have been no answer for the same reason.

An analogy was suggested between a judgment of a Court of Common Law before the *Judicature Act* and a *remate* judgment. It was said that a judgment of a Court of Common Law could not have been considered final if a *remate* judgment was not

final, because a Court of Equity could interpose and prevent the plaintiff from reaping the fruits of his judgment, and that the relation between a Court of Equity and a Common Law Court was very similar to the relation between executive and plenary proceedings.

I think the analogy fails. Equity and Common Law were two distinct systems, unlike any existing in any foreign country. The judgment of a Court of Common Law was complete and final, and adjudicated upon and settled the rights and liabilities at law, and the legal final effect of the common law judgment was in no way impaired because there was a remedy in equity.

The defendant at law could set up every possible defence which would be an answer at law, whereas in the executive proceedings he was precluded from availing himself of any defence which tested the validity of the instrument or contract upon which he was sued.

I am of opinion that the executive are in the nature of interlocutory proceedings, and that the *remate* judgment pronounced in such proceedings is not such a final and conclusive judgment binding the rights and liabilities of the parties as will support an action.

The appeal must be allowed, and the finding of the issue by *North*, J., reversed.

Solicitors: *Ewbank & Partington; Freeman & Bothamley.*

H. C. J.

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1887
Nov. 2, 3.

LEVY *v.* ABERCORRIS SLATE AND SLAB COMPANY.

[1886 L. 2528.]

Debenture—Memorandum of Agreement—Agreement to issue Debentures—Bills of Sales Act (1878) *Amendment Act*, 1882, *s.* 17.

An agreement between a company of the one part and a lender of the other part, whereby the company agreed to pay the lender the sum of £600 with interest, and charged certain hereditaments with the repayment of the said sum of £600 and interest, and further agreed with the lender that they would at any time during the continuance of the security at the request of the lender execute a legal mortgage, and further agreed to issue debentures of the company to the extent of £600 secured over all the capital stock, goods, chattels, and effects of the company, including uncalled capital, both present and future :—

Held, to be in effect a debenture, and within the saving of sect. 17 of the *Bills of Sale Act*, 1882.

Edmonds v. *Blaina Furnaces Company* (1) followed and discussed.

Any document which either creates a debt or acknowledges it, is a "debenture."

IN March, 1885, the Plaintiff advanced to the Defendant company the sum of £600 by way of loan upon an agreement for repayment with interest at 10 per cent. as follows:—

By an agreement dated the 3rd of March, 1885, and made between the company of the one part and the Plaintiff of the other part, the company agreed to repay the Plaintiff, in June, 1885, the said sum of £600, with interest at £10 per cent, and thereby charged all the hereditaments comprised in certain deeds specified in the schedule to such agreement (which deeds were thereupon deposited with the Plaintiff), with the repayment of the said sum of £600 and interest as aforesaid, and further agreed to issue a legal mortgage of the said hereditaments when called on, "and further, to issue to the Plaintiff debentures of the Defendant company to the extent of £600, secured over all the capital stock, goods, chattels, and effects, including uncalled capital, both present and future, of the Defendant company, and that the debentures should be payable on the 3rd of June, 1885, and should bear interest as from that date at the rate of £10 per cent. per annum."

(1) 36 Ch. D. 215.

In October, 1886, the Plaintiff commenced the present action to enforce this agreement, and claimed a charge on the hereditaments comprised in the deeds specified in the schedule, and also a charge on all the capital stock, goods, chattels, and effects of the company, including uncalled capital.

The statement of claim setting out the agreement as above stated, and alleging that the said sum of £600 and interest was still due, was delivered on the 27th of October, 1887. No defence was put in, and the action now came on in default of pleading.

Shortly before the trial of the action the Defendant company had been compulsorily wound up; the only question calling for a report was whether the agreement, so far as it related to the goods, chattels, and effects of the company, was in effect a debenture, so as to be within the saving of sect. 17 of the *Bills of Sale Act* (1878) *Amendment Act*, 1882.

Romer, Q.C., and *Ribton*, for the Plaintiff:—

The agreement to issue debentures in equity creates a charge, and amounts to an equitable contract which ought to be carried into effect; this is a valid charge within the protection of sect. 17 of the *Bills of Sale Act* (1878) *Amendment Act*, 1882: *Ross* v. *Army and Navy Hotel Company* (1). The agreement is in much the same form as that in *Edmonds* v. *Blaina Furnaces Company* (2), which was held to be a debenture and exempt as such from registration under sect. 17.

Further, there being no defence put in, the question whether this is or is not a debenture cannot now be raised by the Defendants.

Sir *A. Watson*, Q.C., and *Byrne*, for the official liquidator:—

The agreement as set out in the statement of claim is in such a form as to shew that it is void, therefore the Defendant was not bound to put in a defence in order to take objection to the agreement. The agreement, so far as it purports to charge the hereditaments specified in the schedule, is good, but so far as it purports to deal with the capital stock, goods, chattels, and effects of the company it is void, first, because it is not in the

(1) 34 Ch. D. 43. (2) 36 Ch. D. 215.

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form prescribed by the schedule to the *Bills of Sale Act*, 1882; and, secondly, for want of registration.

The "issue" of debentures at some subsequent period is clearly contemplated; none have been issued. This agreement cannot be said to have been "issued," and sect. 17 applies to debentures "issued" by a loan or other incorporated company.

"Debenture" is a term that has acquired a well-known meaning, and is almost invariably in a prescribed form quite different from this, issued in a series and payable *pari passu*. The *Bills of Sale Acts* were intended to protect persons not companies; whether the word "person" in a statute can be treated as including a company must depend on a consideration of the objects of that statute: *Pharmaceutical Society* v. *London and Provincial Supply Association* (1).

The legal estate still remained in the company, and they could have at any time issued further debentures which would have ranked *pari passu* with this charge.

Romer, in reply.

CHITTY, J.:—

The Plaintiff in this case sues the Defendant company on an instrument set out in the statement of claim, and the company take a legal objection to the action, and say that the document in question is void under the *Bills of Sale Act* (1878) *Amendment Act*, 1882, on two grounds, first, that it is one that requires registration and it has not been registered; and secondly, that it is not in the form prescribed by the schedule to the Act of 1882, and therefore void under sect. 9. In answer to these objections the Plaintiff alleges that the instrument in question is in effect a debenture, and therefore within the exception of the 17th section. I need not read this section again, it was read *in extenso* in *Edmonds* v. *Blaina Furnaces Company* (2), and I have but little to add to the general considerations to be found in the judgment in that case as to the meaning of the term "debenture," and the interpretations to be placed upon the wording of that section. In my judgment in that case I mentioned one or two reasons as

(1) 5 App. Cas. 857. (2) 36 Ch. D. 215.

possibly governing the intention of the Legislature in the formation of sect. 17: after referring to the two great classes of existing companies, viz.: those established by Act of Parliament incorporating the *Companies Clauses Act*, 1845, and those incorporated under the *Companies Act*, 1862, which are bound by statutory provisions to keep a register of their debentures, I said (p. 219): "The Legislature finding these existing provisions for registration may have considered that it was not necessary to require the registration under the *Bills of Sale Acts* of the secured debentures of an incorporated company. The Legislature may have acted on this ground, or may have taken the broader view that the secured debentures of incorporated companies were not within the mischief intended to be remedied by the *Bills of Sale Act*." I would merely add that the argument to-day was mainly addressed to the form of the instrument before me, but beyond saying that the protection which the Legislature had thrown upon instruments of this kind in favour of the grantor seems scarcely required in favour of a company, I am not able to state any grounds on which the Legislature proceeded when the clause 17 was inserted. Now looking at this section once more I observe that it may be divided into four parts, it relates first to the thing called a "debenture," secondly it, the "debenture" must be "issued," thirdly it must be issued by a particular company, *i.e.* a "mortgage, loan, or other incorporated company"—the term "loan" is a little awkward, and I do not know what is meant by a "loan company," but I passed it by, as also the term "mortgage" company, which is also not quite clear, because I am satisfied that the words "or other incorporated company" are large enough and must be construed as they stand, and are not to be cut down by the context; then the fourth part is that the debenture must be "secured upon the capital stock or goods, chattels and effects of such company."

The material words here are "goods, chattels, and effects."

Now what is a "debenture"? I am unable to add anything to what I have already stated on this point in *Edmonds* v. *Blaina Furnaces Company* (1). My attention has been called to extracts from *Skeat's* Etymological Dictionary and *Blount's* Law Dictionary

(1) 36 Ch. D. 215.

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as to the derivation of the word "debenture," from which it appears that the term is a very old one and is derived from the Latin "*debentur*," because it is said "these receipts began with the words '*debentur mihi*'" (1).

Bearing in mind the four divisions of sect. 17 as I have just given them, I must try and find out what "debenture" means. In the course of the argument I asked Sir *Arthur Watson* and Mr. *Byrne* to define a "debenture," and they did not satisfactorily do so. I do not accept Sir *Arthur Watson's* definition that a debenture must be one of a series of instruments or issued *pari passu* with others.

I have myself known an instance of a single debenture payable to one individual. In my opinion a debenture means a document which either creates a debt or acknowledges it, and any document which fulfils either of these conditions is a "debenture." I cannot find any precise legal definition of the term, it is not either in law or commerce a strictly technical term, or what is called a term of art. It must be "issued," but "issued" is not a technical term, it is a mercantile term well understood; "issue" here means the delivery over by the company to the person who has the charge; as to what "company" means I have already said it must be by "an incorporated company," and it must be secured on "the goods, chattels and effects" of the company. Having thus gone through the section once again, I find I cannot add anything further on this point to what I have already stated in the case of *Edmonds* v. *Blaina Furnaces Company* (2).

I now proceed to look at the particular document before me, which I find contains an agreement to pay the £600 on a certain

(1) In "*Skeat's* Etymological Dictionary," Oxford (Clarendon Press), 1882, occurs the passage which was cited: "Debenture—an acknowledgment of a debt—spelt '*debentur*' by Lord *Bacon* in his old edition of his speech to *James* I. touching purveyors: 'Nay, farther they are grown to that extremity, as is affirmed though it be scarce credible, that they will take double poundage, once when the debenture (old edition *debentur*) is made, and again the second time when the money is paid.'" *Blount* in his Law Dictionary has "Debenture was by a Rump Act, 1649, ordained to be in the nature of a bond or bill, &c., the form of which *debentur* as then used you may see in *Scobel's* Rump Acts, 1649, c. 63. Latin *debentur*, they are due, because these receipts began with the words *debentur mihi*."

(2) 36 Ch. D. 215.

day, a charge on certain hereditaments referred to in the schedule, and an agreement to execute a legal mortgage when called for; and then further, according to the words of the statement of claim, which I am obliged to refer to instead of the original documents, because the Defendant declined to allow the claim to be amended or to put in the original agreement, "to issue to the Plaintiff debentures of the Defendant company to the extent of £600 secured over all the capital stock, goods, chattels, and effects, including uncalled capital both present and future of the Defendant company, and that the debentures should be payable on the 3rd of June, 1885, and should bear interest as from that date at the rate of £10 per cent. per annum." Now this document, it seems to me, is one which creates a debt, shews the existence of a debt, and acknowledges it. Apart from the *Bills of Sale Act*, 1882, this clause would in equity create an immediate charge in favour of the grantee: an agreement to give a charge is a charge in equity, and that is the reasoning of Lord Justice *Cotton* in *Ross* v. *Army and Navy Hotel Company* (1), when he says (2): "If the deed"—that is the covering deed—"had not been executed at all there would have been in the debenture itself a contract to give such a security as was intended to be given by the deed." I have here a contract to give a charge which in equity is a charge: it is therefore a charge on the goods, chattels, and effects of the company; the goods, chattels, and effects therefore form a security for this debt; reasoning the case out in this way the result is as plain as it can be on such a section as the one before me—which is by no means plain—that this document is a debenture, and that it is issued, and that it in fact complies with the four points I mentioned above.

I may add this, that if the debentures had been actually issued in compliance with the agreement, it is clear that the 17th section would apply. I have here before me a document not in form the same as a debenture in the commonly accepted interpretation of the term, but its legal effect is the same, and it would be a strange interpretation to put upon this section to assume that it said that where the legal effect of two instruments was identical yet because there was some slight difference in

(1) 34 Ch. D. 43. (2) 34 Ch. D. 53.

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form the one should be good and the other void. It is true that the document before me is not called a debenture, but that is no sufficient reason why it should not in effect be one; I cannot read it as Sir *Arthur Watson* wanted me to do, as a contract that it should not operate as a debenture; the parties had no such idea as this in their minds at the time, and I cannot impute such an intention to them. I think, therefore, that a mere agreement to issue what are called "debentures" is not sufficient to prevent the agreement itself from operating as a debenture within the protection of sect. 17. I cannot assent to Mr. *Byrne's* argument that after the execution of the agreement it would have been competent for the company to issue further debentures *pari passu* with this charge.

There is no ground here on the facts as they appear by this statement of claim for saying that this agreement is not within the protection of sect. 17. The result, therefore, is, that the Plaintiff is, in my opinion, entitled to the judgment he has asked for.

Solicitors: *Edward Lee; Carr & Son.*

G. M.

CHITTY, J. 1887 *Nov.* 8, 9.

In re WENMOTH'S ESTATE. WENMOTH *v.* WENMOTH.

[1885 W. 3808.]

Will—Gift to Class—Ascertainment of Class—Gift of Income—Period of Distribution.

The "rule of convenience," by which in a bequest of an aggregate fund to children as a class, payable on attaining a given age, the period of ascertaining the class is the time when the first of the class by attaining the given age becomes entitled to payment, and children coming into *esse* after that period are excluded, is not applicable to similar bequests of income.

WILLIAM WENMOTH, who died in February, 1871, by his will, dated the 19th of April, 1870, after certain pecuniary and specific bequests gave all the residue of his property upon trust to pay to his daughter *Eliza* (Mrs. *M'Kever*) an annuity, and

directed his trustees during the life of his said daughter to pay and apply the surplus of the rents, dividends, interest, and annual proceeds, and after her death to apply the whole of such income "unto and equally between my grandchildren (being the children of my son *Joseph* and my said daughter *Eliza*) on their respectively attaining the age of twenty-one years, during their respective lives, share and share alike." On the death of any grandchild (except the last survivor) who should die leaving issue the share of such income and annual proceeds of such grandchild so dying to be paid unto and equally between his or her children who being sons should attain twenty-one or being daughters should attain that age or marry. After the death of the last surviving grandchild the residuary estate to be converted, and the proceeds of the conversion to be divided equally amongst testator's great grandchildren living at the death of his last surviving grandchild and attaining twenty-one. The share of any grandchild in the said rents and annual proceeds to be invested by the trustees during the minority of any such grandchild and form part of the trust. The trustees were also empowered to apply all or any of the share of the income or capital of any minor for his or her maintenance, education, or advancement.

Mrs. *M'Kever* had two children, both of whom died in the testator's lifetime.

Joseph Wenmoth had eleven children, of whom eight were now living.

Of these eight grandchildren of the testator five were born in the testator's lifetime, and the eldest attained twenty-one on the 25th of March, 1883. Two were born after the testator's death and before the eldest grandchild attained twenty-one; one was born in February, 1887.

The question, raised by originating summons, was whether the trusts of the will for the benefit of grandchildren were confined to such grandchildren as were living at the testator's death, or extended (a) to grandchildren born after his death, before the eldest grandchild attained twenty-one, or (b) to all grandchildren whenever born. A further question was whether the grandchildren who for the time being had attained twenty-one were

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entitled to the whole of the net income, subject to Mrs. *M'Kever's* annuity; and if not, to what part of such income they were entitled, and whether the Plaintiff (the surviving executor) could apply any and what part of such income for the maintenance, &c., of such of the grandchildren as for the time being were under twenty-one.

A. Whitaker, for the Plaintiff, the surviving trustee and executor.

S. Stephens, for the five grandchildren who were living at the testator's death:—

The only persons entitled to take are those grandchildren who were born during the testator's lifetime and living at the time of his death: *In re Coppard's Estate* (1); *Elliott* v. *Elliott* (2).

Dunham, for the two grandchildren born after the testator's death but before the eldest grandchild attained twenty-one:—

Having regard to the *catena* of authorities, *In re Coppard's Estate*, which limits the class to take to those living at the testator's death, must be confined to its own circumstances. According to the general rule (see *Hawkins* on Wills (3)) the time for ascertaining the class is the period when the first of the class by attaining the specified age becomes entitled to receive his share —in this case when the eldest grandchild attains twenty-one— and grand-children coming into *esse* after that period will be excluded: *Andrews* v. *Partington* (4).

[CHITTY, J., referred to *Whitbread* v. *Lord St. John* (5).]

And this rule has operated to prevent the gift being held void for remoteness: *Picken* v. *Matthews* (6). [He also cited *In re Sayer's Trusts* (7).]

Jason Smith, for grandchildren born after the eldest child attained twenty-one:—

The "rule of convenience" as to a bequest of *corpus* to a class

(1) 35 Ch. D. 350.
(2) 12 Sim. 276.
(3) Pages 75, 76.
(4) 3 Bro. C. C. 401.
(5) 10 Ves. 152.
(6) 10 Ch. D. 264.
(7) Law Rep. 6 Eq. 319.

does not apply to a gift of income. Being opposed to the intention of the testator, it is not to be applied when it is not necessary; there being also a rule that all who are born up to the time when the share becomes payable are to be let in: *In re Emmet's Estate* (1). And the reason of the rule, that the child who has attained twenty-one cannot be kept waiting for his share, and that a share once paid cannot be got back (see *Gillman* v. *Daunt* (2)), has no bearing where the gift is of income, which is payable periodically. A devise of real estate in trust to pay the rents for the maintenance of children begotten and to be begotten has been held to let in after-born children: *Mogg* v. *Mogg* (3). The construction of the will for the purpose of ascertaining the members of the class to take must be determined as if there was no law of remoteness: *Pearks* v. *Moseley* (4).

[He also cited *In re Bedson's Trusts* (5).]

Ashton Cross, for the next of kin.

Dunham, in reply, cited *Dias* v. *De Livera* (6), that in the case of a pecuniary legacy to a child already born, and to future children of *A.*, children born after the death of the testator would be excluded.

CHITTY, J.:—

An immediate gift of personal estate to the children of *A.* is free from doubt, and those children only take who are living at the testator's death. A gift to the children of *A.* who shall attain the age of twenty-one, is also one on which no question can arise. The class of children in either case remains open until the period of distribution and then closes, and all those children who may be born before the death of the testator, or before the eldest of them has attained twenty-one, are admissible, while those born after the period of distribution are excluded. This rule, excluding as it does from the class to be benefited any child born after the period of distribution, may be explained by the attempt of the Court to reconcile two inconsistent directions,

(1) 13 Ch. D. 484, 490.
(2) 3 K. & J. 48.
(3) 1 Mer. 654.
(4) 5 App. Cas. 714, 719.
(5) 28 Ch. D. 523.
(6) 5 App. Cas. 123.

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viz., that the whole class should take and also that the fund should be distributed among them at a period when the whole class could not possibly be ascertained. The rule, which was intended as a solution of the difficulty, may be said to be a cutting of the knot rather than an untying, and, though it has been called a rule of convenience, must be very inconvenient to those children who may be born after the period of distribution. In *Gillman* v. *Daunt* (1), Lord *Hatherley*, when Vice-Chancellor, said that a child "who has attained twenty-one cannot be kept waiting for his share; and if you have once paid it to him, you cannot get it back." Where, however, as in this will, the distribution is of income and not of *corpus* there is nothing which requires the application of the rule, and the difficulty does not arise.

In the case of the distribution of *corpus*, the trustees cannot ascertain what is the aliquot share of a member of the class until the class is closed, but in the case of a distribution of income the distribution is periodical. Each member of the class, as soon as he becomes entitled, takes his share of the income, and there is no reason why the rule should be applied beyond each periodical payment. I have no difficulty, therefore, upon principle in holding that in the case of a bequest of income among a class of children to be paid on their attaining twenty-one years, the date of the first attaining twenty-one years was not the date of the ascertainment of the class, and that any child at any time attaining twenty-one years will be entitled to a share of the income. *Mogg* v. *Mogg* (2) appears to me to be an authority for my decision as to the distinction between a gift of *corpus* and a gift of income. In the two cases cited in support of the contention that the grandchildren living at the testator's death were the only objects to take under the bequest (*Elliott* v. *Elliott* (3); *In re Coppard's Estate* (4)), there was a question in each as to the rule against perpetuities, and although in neither case was remoteness made the actual *ratio decidendi* such a construction was adopted as avoided an intestacy by the operation of the law of remoteness, and the decision in each case saved the will. The general law on this point is stated by Lord *Selborne* in *Pearks* v.

(1) 3 K. & J. 48.
(2) 1 Mer. 654.
(3) 12 Sim. 276.
(4) 35 Ch. D. 350.

Moseley (1): "You do not import the law of remoteness into the construction of the instrument, by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect." If I thought those two cases in point I should have to consider them very carefully, but I do not. I decline to decide the question as to the interests of the great grandchildren as being premature.

MINUTE OF ORDER.—Declare that on the true construction of the will, and having regard to the events that happened and the existing circumstances, the income of the trust estate, subject to Mrs. *McKever's* annuity, is divisible into eight parts, and one of these parts is now payable to each of the three eldest grandchildren, they having attained twenty-one, and that the other five parts are subject to the power of maintenance and advancement contained in the will (the five infant grandchildren being objects of such power of advancement) and that, subject to the exercise of such power of maintenance and advancement, the surplus of the remaining five shares is to be invested as directed by the will.

Solicitors: *C. G. Hobbs; Wolferstan & Avery.*

(1) 5 App. Cas. 719.

F. G. A. W.

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Nov. 2, 3, 7, 8, 9, 10, 14, 15; *Dec.* 5.

BATEMAN *v.* POPLAR DISTRICT BOARD OF WORKS (No. 2).

[1886 B. 1652.]

Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 72, 74, 76, 250 [*Revised Ed. Statutes, vol. xii., pp.* 673, 675, 676, 726]—*Injunction—Nuisance—"Sewer"—"Drain"—Vesting of Sewers in District Board—Drainage of contiguous Houses by "Combined Operation"—Connection with Drain illegally made without Knowledge of Board—Liability of Board.*

The duty imposed by sect. 72 of the *Metropolis Local Management Act*, 1855, on a district board, to keep the sewers which are by the Act vested in them so as not to be a nuisance, is not an absolute duty, but only a duty to use all reasonable care and diligence to keep the sewers in a proper condition.

If, therefore, a drain, which was originally a private drain, has, by reason of another drain being connected with it, become a "sewer," and therefore by the Act vested in the district board, the board will not be liable for a nuisance caused by the drain, if it is shewn that the connection was made illegally without the knowledge of the board, and that before action brought they did not know, and could not by the exercise of reasonable care have discovered, that the drain was a "sewer."

Hammond v. *Vestry of St. Pancras* (1) followed.

THIS was the trial of the action.

The action was brought to restrain the continuance of a nuisance alleged to be produced by offensive smells proceeding from sewers and drains of and under the control of the Defendants, and for damages. *F. Bateman*, one of the Plaintiffs, was the owner, for the residue of a term of twenty-one years, of a block of fifteen contiguous houses, known as *Vulcan Terrace*, situate on the north side of and fronting upon *Wallis Road, Victoria Park*, within the Defendants' district; the other Plaintiff, *James Meckiff*, was the occupier of one of the houses. Under *Wallis Road* (which ran east and west) and in front of *Vulcan Terrace* was a 12-inch sewer, which was admitted to belong to the Defendants. At the rear of *Vulcan Terrace*, and passing under the backyards or gardens of the houses, was a 9-inch sewer or drain, into which the sewage of the fifteen houses was carried by a drain from each house, and

(1) Law Rep. 9 C. P. 316.

which carried the sewage of all the houses into a main sewer under *Windsor Road*, a road running north and south, and joining *Wallis Road* near the west end of *Vulcan Terrace*. This main sewer was the property of the Metropolitan Board of Works. The houses in *Vulcan Terrace* were numbered 1 to 15, from west to east.

The 9-inch drain was constructed in the year 1877, when *Vulcan Terrace* was built, with the approval of the Defendants, upon the application of the then owner of the land.

By their statement of claim the Plaintiffs said that they "have severally suffered damage from offensive and pestilential smells and vapours which the Defendants have permitted to emanate from the sewers and drains of and under the control of the Defendants situate near to, at the rear and in front of, the Plaintiffs' said premises, and to pervade the same."

Upon a motion by the Plaintiffs for an interlocutory injunction the Court of Appeal (reversing a decision of *North*, J.), held (1) that the 9-inch drain was not a "sewer" within the meaning of sect. 250 of *Metropolis Local Management Act*, 1855, but that it was a "drain" within the meaning of that section, and, consequently, that it was not vested in, or the property of, the Defendants, and that they were not responsible for it. The motion for an injunction was accordingly refused so far as regarded the 9-inch drain.

After the decision of the Court of Appeal, the Plaintiff *Bateman* had an investigation made by excavating the ground at the rear of *Vulcan Terrace*, and it was then discovered that, at a man-hole in the backyard or garden of the house No. 5 in *Vulcan Terrace*, a drain coming from a factory, belonging to a different owner and situate to the north of *Vulcan Terrace*, which drain itself also received drains from other premises belonging to other owners, was connected with the 9-inch drain, so that the drainage from the factory and other premises was there discharged into the 9-inch drain, and flowed along it into the main sewer under *Windsor Road*. Before this discovery was made neither the Plaintiffs nor the Defendants were aware of the existence of this connection. The connection between the two drains could not

(1) 33 Ch. D. 360.

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have been legally made without the consent both of the Defendants and of the Metropolitan Board, but, though a search had been made in the books of both boards, no record could be found of the consent of either board having been given to the connection. There was no evidence as to how or when the connection was made.

Waddy, Q.C., *T. L. Wilkinson*, and *Crispe*, for the Plaintiffs.

Napier Higgins, Q.C., and *Borthwick*, for the Defendants:—

The Defendants cannot at any rate be responsible for so much of the 9-inch drain as lies to the east of the man-hole. The decision of the Court of Appeal still applies to that part. And, as to the part which lies to the west of the man-hole, the connection with the other drain, which was illegally made without the knowledge of the Defendants, cannot alter their rights and liabilities. It cannot make them responsible for a sewer of the existence of which, as a "sewer," they were entirely ignorant. A "sewer" cannot be vested in them without their knowledge or consent. The onus is on the Plaintiffs to prove that the consent of the Defendants was given to the connection of the other drain with the 9-inch drain, so as to make the latter a "sewer" which is vested in the Defendants.

T. L. Wilkinson, in reply:—

The question is, who is the owner of the 9-inch drain to the west of the man-hole? As a matter of fact, the drainage from different curtilages is connected at the man-hole, and the drain to the west is, therefore, a "sewer," as defined by sect. 250 of the Act of 1855, and is vested by sect. 68 (1) in the Defendants.

(1) Sect. 68 of the *Metropolis Local Management Act*, 1855, provides that "All sewers made and to be made within any such parish or district, except sewers and works vested or to be vested in the Metropolitan Board of Works, as hereinafter mentioned, shall be vested in such vestry and board respectively."

By sect. 72: "Every vestry and district board shall cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance or injurious to health, and to be properly cleared, cleansed, and emptied."

Sect. 74 enabled the vestry or board to order that a group or block of con-

The actual condition of things can alone be regarded. The object of the Act was to supply a ready test by inspection of the ownership of any drain or sewer, and the responsibility for it.

[NORTH, J.:—If the connection had been made without the consent of the Plaintiff or his predecessor in title, would it have had the effect of taking away from him his property in his own drain, and vesting it in the board ?]

The board have a summary power of removing an unauthorized connection. If the connection was taken away the property in the drain would revert to the original owner. It would be vested in the board only so long as the connection existed. A private owner could not by severing a connection make a "sewer" cease to be a "sewer," and thus take away from the board a property what was vested in them. The 9-inch drain to the west of the man-hole answers the definition of a "sewer" contained in sect. 250, and the Court cannot look any further, whatever may have been the origin of the connection at the man-hole. The board have a remedy against any person who has been guilty of an unlawful act.

1887. Dec. 5. NORTH J. (after stating the facts, continued):—

It is now contended that, having regard to the discovery made by the Plaintiffs since the hearing of the appeal motion, it is clear that the 9-inch drain is a "sewer" within the meaning of sect. 250 of the Act of 1855, at any rate as regards that part of it which lies to the west of the man-hole; because the drainage of the

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tiguous houses shall be drained by "a combined operation."

Sect. 76, gives (as the Court of Appeal held) to the vestry or board a similar power with reference to the drainage of new houses.

By sect. 250: "In the construction of this Act .... the word 'drain,' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain,' interpreted as aforesaid, applies."

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fifteen houses is connected with the drainage from the factory, and the 9-inch drain is not "used for the drainage of one building only or premises within the same curtilage," or a "drain for draining a block of houses by a combined operation." No explanation has been given as to when this newly discovered drain was constructed. It has been argued that, by reason of the connection between this drain and the 9-inch drain having been made by some unknown person, the rights and liabilities of the Plaintiff *Bateman*, or his predecessor in title, and of the Defendants have been altered. It is clear that the connection could have been legally made only if the consent of the district board and the Metropolitan Board had been obtained. It was illegal to make the connection without the consent of both those bodies. But it has been argued that, however illegally the connection was made, the definition of the word "sewer" contained in sect. 250 settles the question who is the owner of the 9-inch drain, and who is responsible for it. I am not at present prepared to hold that the unlawful act of a stranger, done without the consent of the owner of *Vulcan Terrace*, could affect his ownership of the 9-inch drain or the liability of the district board, by vesting the drain in them and thus throwing the responsibility for it upon them; or even that, if the connection was made by the permission of the owner of *Vulcan Terrace* or his tenant, the responsibility of the board could be affected without their consent. This is an important question which should not be decided unless it necessarily arises for decision. I do not intend to decide it finally now, for there is a different ground on which I must decide the present case in favour of the Defendants. The liability of the Defendants in respect of the 9-inch drain, if they are liable at all, is imposed on them by sect. 72 of the Act, and it is said that, the 9-inch drain being a "sewer" within the meaning of sect. 250, the obligation of maintaining it in proper condition is cast upon the Defendants, and that, if they fail to perform this obligation, they are liable to an injunction and to damages. It would be a strange thing if sect. 72 imposed on a district board a liability in respect of a "sewer" of the existence of which they had no knowledge, or which they believed to be a "drain." An obligation arises only when there

is a duty, and, even then, only when there is knowledge of the duty. In *Comyns'* Digest, tit. "Action upon the case for Misfeasance (B.)," it is said: "An action upon the case does not lie, where a man has not sufficient notice of his duty." That principle has been already applied to this very sect. 72 in *Hammond* v. *Vestry of St. Pancras* (1), a case the facts of which were very like those of the present case. Under the plaintiff's premises there was a brick drain, which, though originally a private drain, had, by reason of two other houses having been drained in it, become a "sewer." The existence of this drain or sewer was unknown to the defendants' surveyor, nor had any notice of the alteration been given to him. The drain having by some means got out of repair and become choked up, the soil overflowed into the plaintiff's cellar and did damage. There was evidence that the stoppage of the brick drain was probably occasioned by rats, and also that the barrel drain or sewer in the public road, into which the brick drain should have emptied itself, was free from obstruction. The action was brought to recover damages from the defendants for the injury caused by the overflow of the sewage. In that case the action was not founded on any negligence of the defendants; it was only alleged that the defendants had permitted the sewage to flow into the plaintiff's cellar. The jury found that the brick drain was a "sewer"; that it was not known to the vestry, but that it might have been ascertained and known by the exercise of reasonable care and inquiry; that the obstruction was not known before the injury occurred, and that it could not have been known by reasonable care that the brick drain was obstructed. A verdict was thereupon entered for the plaintiffs for £50, leave being reserved to the defendants to move to enter the verdict for them, if the Court should be of opinion that, upon the evidence and upon the findings, no liability attached to the defendants. The defendants moved accordingly, and also for an arrest of judgment upon the ground that the declaration disclosed no cause of action: and the Court of Common Pleas held that they were entitled to the verdict, and arrest of judgment. Mr. Justice *Brett* in giving judgment said (2):—
"It was contended on behalf of the plaintiff that that section

(1) Law Rep. 9 C. P. 316. (2) Law Rep. 9 C. P. 320.

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imposed upon the defendants an absolute duty to keep the sewers properly cleared, cleansed, and emptied, and that, by reason of their neglect of that duty the overflow complained of ensued. On the part of the defendants it was insisted that sect. 72 does not impose upon the vestry or district board an absolute duty to keep the sewers cleansed at all events, but only the duty of using all reasonable care and diligence to keep them in a proper and serviceable condition; and that, if a sewer be foul and uncleansed, but without any want of reasonable care and diligence on the part of the vestry, if they have done all that careful and prudent men could do, they are not liable for the consequences." After stating the verdict and the material findings of the jury, the learned Judge continued (1):—"It was contended on the part of the defendants that the fact that the brick drain existed was unknown to them absolved them from responsibility. But that seems to me to be answered by the finding of the jury, that they might have ascertained its existence by the exercise of reasonable care and inquiry. Ignorance under the circumstances cannot excuse them. I think the case must stand as if the vestry had knowledge of the existence of the brick drain. Upon the facts and the findings we must assume that the brick drain was a 'sewer'; and therefore we must take it that the defendants knew of the brick drain, and that the injury to the plaintiff happened through its not having been properly cleansed. Now, if the 72nd section does throw upon the defendants an absolute duty or obligation to guarantee that the sewers shall be at all times kept cleansed, it follows that, if any injury arises to an individual from their not being so kept, the vestry are liable. The question therefore is, what is the proper construction of the Act of Parliament. That, as it seems to me, will dispose of both points; for both turn upon the construction of sect. 72. The declaration does not charge the defendants with having been guilty of negligence. It discloses no common law liability in the defendants, and can only be a valid declaration if it can be supported upon the statute." I can draw no distinction between the declaration in that case and the statement of claim in the present case. The present Plaintiffs put their case, not on the

(1) Law Rep. 9 C. P. 321.

negligence of the Defendants, but on their omission to perform a statutory duty. Mr. Justice *Brett* continued: "The words of sect. 72 are susceptible of either meaning—that an absolute duty is cast upon the defendants, or that they are only bound to exercise due and reasonable care. What, then, is the proper rule of interpretation? The defendants are a public body having a duty imposed upon them by Parliament to do a thing which even with the exercise of the utmost care and diligence may not always be capable of being done. It is obvious that circumstances may arise in which a sewer notwithstanding the exercise of reasonable care may be obstructed. The terms of the finding in this case assume that. The jury find in effect that the brick drain was obstructed, but that the obstruction was not known to the defendants, and could not by the exercise of reasonable care have been known to them. It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may notwithstanding be absolute; but, if so, it ought to be imposed in the clearest possible terms. The intention of the Legislature is to be gathered from the language used and the subject-matter. Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed. According to my view of sect. 72, therefore, the vestry or district board are not to be held liable for not keeping their sewers cleansed at all events and under all circumstances; but only where by the exercise of reasonable care and diligence they can and ought to know that they require cleansing, and where by the exercise of reasonable care and skill they can be kept cleansed. I therefore think the rule should be made absolute to enter a verdict for the defendants, and to arrest the judgment." Mr. Justice *Denman* gave judgment to the same effect.

In that case it was held that the defendants were in the same position as if they had known of the existence of the brick drain, and that it was a sewer, and yet that they were not responsible for the obstruction, because they could not by the exercise of reason-

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able care and inquiry have discovered it. The present case is a much stronger one in favour of the Defendants, because I hold, not only that they did not know that the 9-inch drain was a "sewer," but also that they could not have discovered it by the exercise of reasonable care. The Plaintiffs could not have told them anything about it, for they did not know it themselves. The present case, as it seems to me, is an *à fortiori* case, and, as the defendants in *Hammond* v. *Vestry of St. Pancras* (1) were held not to be liable for an obstruction of which they did not know, and which they could not by the exercise of reasonable care have discovered, so the present Defendants cannot be held liable for a sewer of the existence of which they did not know, and could not by reasonable care and inquiry have discovered. Even if, on the true construction of the Act, the 9-inch drain west of the man-hole is a sewer, the Defendants were not, in my opinion, at the time when the action was commenced, under any liability to, or subject to any right of action by, the Plaintiffs in respect of it.

[His Lordship then reviewed the evidence as to the alleged nuisance caused by the sewer under *Wallis Road*, coming to the conclusion that the Plaintiffs had failed to establish their case on this head; and he dismissed the action with costs.]

Solicitor for Plaintiffs: *Edward Clarke.*
Solicitors for Defendants: *Oldman & Clabburn.*

(1) Law Rep. 9 C. P. 316.

W. L. C.

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Dec. 6, 12.

Bill of Sale — Registration — "Personal Chattels" — "Fixtures" — "Trade Machinery" — "Debenture" — Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 5, 8 [*Revised Ed. Statutes, vol. xviii. pp.* 652–654] — *Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 17.

The effect of sect. 5 of the *Bills of Sale Act*, 1878, is that the articles which are thereby excluded from the definition of "trade machinery" therein contained are not "personal chattels" within the meaning of the Act for any purpose whatever, and consequently any assignment of such articles does not require registration under the Act. And this applies to such articles even though they are not actually affixed to the land with which they are assigned, but (by virtue of an easement) to other land belonging to a stranger.

A brick-making company deposited their title-deeds to certain beds of coal and fire-clay with their bankers, together with a memorandum which stated that the deposit was made to secure to the bankers "payment of all sums of money which we are now, or at any time hereafter may be, indebted to you, whether on current account for principal, interest, commission and charges, or on any other account whatsoever. And, in consideration of the advances now made to us, and of our account being continued, we undertake to execute, when thereunto requested, a proper mortgage, with immediate power of sale, or such further security as may be necessary for the purpose of effectually transferring to any person or persons whom you may designate for that purpose, the legal estate in the property to which this security relates."

The memorandum did not contain any acknowledgment of any specific debt, nor any covenant or agreement by the company for payment, except so far as the same was implied in the agreement to execute a legal mortgage of the property. The company were not the owners of the surface of the land under which the beds of coal and fire-clay lay, but they had the right to use the surface for the purpose of working the minerals, and they had erected on the surface certain trade machinery of the kind excluded by sect. 5:—

Semble, that the memorandum was not a "debenture" within the meaning of sect. 17 of the *Bills of Sale Act* of 1882.

Edmonds v. *Blaina Furnaces Company* (1) observed upon.

And *held*, that the assignment of the trade machinery did not require registration.

INTERPLEADER SUMMONS by the sheriff of *Yorkshire* to determine the right to certain machinery belonging to the De-

(1) 36 Ch. D. 215.

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fendant company which he had seized under a *fi. fa.* issued by the Plaintiffs, who were judgment creditors of the Defendant company. The machinery was claimed by the *Yorkshire Banking Company* by virtue of an equitable mortgage from the Defendant company.

In the year 1811 an Act (51 Geo. 3, c. cxxviii.) was passed, for the inclosure of certain commons and waste grounds within the manor of *Pudsey*, in *Yorkshire*. The Act contained a recital that *Charles Milner* was lord of the manor of *Pudsey*, and "as such is owner of the soil of the said commons and waste grounds, and entitled to all mines, minerals, and royalties of, within, and under the said commons and waste grounds." Sect. 23 provided that, after the setting out and allotting one-sixteenth part to *Charles Milner* and *Thomas Thornhill* as thereinbefore mentioned, the Commissioners thereby appointed should set out and allot "the residue of the said commons and waste grounds unto and amongst the several proprietors of messuages, cottages, and tofts within the said manor, which have been erected sixty years and upwards, and are entitled to rights of common upon the said waste ground, (with certain exceptions,) and the owners of the old inclosed lands and grounds situate and being within the said manor, in such parts, shares, and proportions as hereinafter mentioned." Sect. 35 provided that "nothing herein contained shall extend or be construed to extend to defeat, lessen, or prejudice the right, title, or interest of the said *Charles Milner*, or any of the future lord or lords, lady or ladies of the manor of *Pudsey* aforesaid, in or to the seigniories and royalties incident or belonging to the said manor of *Pudsey*, but that the said *Charles Milner*, and such other person or persons as aforesaid, shall and may from time to time for ever hereafter hold and enjoy (*inter alia*) all mines, minerals, and quarries, of what nature or kind soever, lying and being within or under the said commons and waste grounds, in as full, ample, and beneficial a manner, to all intents and purposes, as they could or might respectively have held and enjoyed the same in case this Act had not been passed; and that the said *Charles Milner*, and such other person or persons as aforesaid, shall and may, from time to time and at all times hereafter, have, hold, win, work, and enjoy exclusively all mines

and quarries, of what nature or kind soever, within and under the said commons and waste grounds, and within and under every part thereof (save and except only the said public quarries hereinbefore directed to be set out as aforesaid), together with all convenient and necessary ways, and full liberty of making, laying, and repairing waggon ways and other ways in, through, over, and upon the said commons and waste grounds, or any part thereof; and with full and free liberty, power, and authority of digging, sinking, and searching for, winning, and working the said mines, minerals, and quarries, and leading and carrying away the stones, slate, flags, lead ore, coals, ironstone, fossils, and other things to be gotten thereout, and of making pits, shafts, and pumps, pit rooms, drifts, levels, and watercourses, and of repairing, amending, and upholding the same; and of erecting, building, and using houses, kilns, fire engines, and other engines, mills, and other erections and buildings, and of altering, changing, pulling down, and carrying away the same, or all or any of the materials thereof, at their free will and pleasure; and to do, execute, and perform all such other works, acts, matters, and things, either now in use or hereafter to be invented, as shall or may be necessary for the full and complete working, use, and enjoyment of the said mines, minerals, and quarries hereby reserved, in as full, ample, and beneficial a manner, to all intents and purposes, as they might or could have done in case this Act had not been passed; yet nevertheless the said *Charles Milner*, or such lord or lords, lady or ladies of the said manor for the time being, shall annually make, pay, and allow to the person or persons who for the time being shall be proprietors or occupiers respectively of the ground wherein any quarries, pits or shafts shall be made, sunk, driven, or worked, or such engines, machines, or buildings erected, or such rubbish laid, or such ways, roads, or passages made and used respectively, an adequate, full, fair, and reasonable compensation, recompense, and satisfaction for all such damages as shall from time to time, by the exercise and enjoyment of all and every or any of the liberties and privileges aforesaid, be done thereto, or to any buildings to be erected, made, or constructed thereon, or any part thereof, in proportion to the injury such proprietors or occupiers shall sustain thereby."

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In June, 1883, *Joseph Illingworth*, the then lord of the manor, sold and assigned to *W. P. Tattersall* all the coal and fire-clay in the manor belonging to him, with the right to work the same; and it was provided that *Tattersall* should and would, in the working and getting of the coal and fire-clay, observe and perform all and every the provisions prescribed by sect. 35 of the Act, and which on the part of the lord of the manor were to be observed and performed, and keep *Illingworth* indemnified therefrom. On the 1st of August, 1883, *Tattersall* assigned his interest in the coal and fire-clay to *James Gray* and *Henry Horn*, and they afterwards assigned their interest to the Defendant company, which was incorporated by registration in November, 1884. The memorandum of association stated that the objects of the company were (*inter alia*) "to acquire and continue the business of brickmakers, colliery proprietors and dealers in coal, ironstone, clay, and other minerals carried on" by *Gray & Horn*.

The surface of the land belonged to one *Thornton*.

The company afterwards erected on the surface of the land for the purposes of their business a fixed steam-engine, with main shafting and gearing; a fixed boiler with mountings; a fixed donkey-engine, with fixed pumps and well cover; a fixed weighing-machine, and certain steam-piping and the fittings thereof in the drying-shed. These articles were fixed to the surface of the land.

After these articles had been erected the Defendant company deposited their title-deeds to the coal and fire-clay, viz., a copy of the Inclosure Act, and copies of the agreements of June and August, 1883, and the agreement by *Gray & Horn* for the sale to a trustee for the company, with their bankers, the *Yorkshire Banking Company*, together with a memorandum of deposit, dated the 3rd of December, 1885. This memorandum was signed by *John Waugh* and *Thomas Firth*, two of the directors of the Defendant company, and was sealed with the seal of the company. It was addressed to the banking company, and stated that the directors of the Defendant company "have deposited with you the title-deeds or other securities enumerated in the schedule annexed hereto, for the purpose of securing to you payment of all sums of money which we are now, or at any time hereafter

may be, indebted to you, whether on current account for principal, interest, commission and charges, or on any other account whatsoever, whether the same be due from us separately or jointly with any other person or persons. And we hereby declare that this security shall be and remain valid, notwithstanding any change in the name, style, or composition of any firm under which we may at any time carry on business, or of which we may at any time be members, and notwithstanding any change in the constitution of your company. And, in consideration of the advances now made to us, and of our account being continued, we hereby jointly and severally undertake to execute, when thereunto requested, a proper mortgage, with immediate power of sale, or such further security as may be necessary for the purpose of effectually transferring to any person or persons whom you may designate for that purpose the legal estate in the property to which this security relates. And we further declare that this security is and shall be additional to all securities you may now or hereafter hold on this behalf."

This memorandum was never registered under the *Bills of Sale Acts*.

The machinery above-mentioned was seized by the sheriff under the Plaintiffs' execution. After the sale of other articles seized, a balance of £116 11*s.* 2*d.* remained due on the judgment. The bank claimed by virtue of their equitable mortgage to be entitled to the machinery. A considerable sum was due to the bank on their security.

It was admitted that the minerals which had been conveyed to the company were at some distance below the surface, so that between them and the surface there was interposed a stratum of earth of some thickness which did not belong to the company.

G. Henderson, for the Sheriff.

Ashton Cross, for the Bank:—

Independently of the *Bills of Sale Acts* the bank are entitled to the machinery in question by virtue of their equitable mortgage. It passed to them because it was fixed to the soil: *Meux* v. *Jacobs* (1). Nor do the *Bills of Sale Acts* make any difference.

(1) Law Rep. 7 H. L. 481.

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The machinery in question comes within that which, by sect. 5 (1) of the *Bills of Sale Act*, 1878, is excluded from the

(1) Sect. 4 of the *Bills of Sale Act*, 1878, provides that: "In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction, (that is to say,)

"The expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred, but shall not include" certain specified documents.

"The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (when separately assigned or charged) fixtures and growing crops, but shall not include" (*inter alia*) "chattel interests in real estate, nor fixtures (except trade machinery as hereinafter defined), when assigned together with a freehold or leasehold interest in any land or building to which they are affixed."

By sect. 5: "From and after the commencement of this Act trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act.

"For the purposes of this Act—

"'Trade machinery' means the machinery used in or attached to any factory or workshop;

"1st. Exclusive of the fixed motive powers, such as the water-wheels and steam-engines, and the steam-boilers, donkey-engines, and other fixed appurtenances of the said motive powers; and

"2nd. Exclusive of the fixed power machinery, such as the shafts, wheels, drums, and other fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose; and

"3rd. Exclusive of the pipes for steam, gas, and water in the factory or workshop.

"The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act.

"'Factory or workshop' means any premises on which any

definition of "trade machinery" given in that section, and it is, therefore, not within the *Bills of Sale Acts* for any purpose whatever, and a mortgage of it does not require registration. Though the surface of the land is a separate tenement, yet the machinery is in a legal sense affixed to, and passes with, the freehold interest in the mines. The lord (now represented by the company) does not stand in the same position as a mere licensee; he is the owner of the soil. It cannot be said that, because there is an intervening tenement, the machinery is not attached to the soil below. Though the fire-clay is some little distance below the surface, the right to use the surface for the purpose of raising the clay is, together with the right to the clay itself, one indivisible freehold. In substance, the machinery in question is affixed to the minerals below the surface, just as if a fixed engine rested upon a bed of asphalte or blocks of india-rubber sunk in the soil.

[NORTH, J.:—In such a case there would not be a tenement belonging to a third person interposed.]

The right to use the surface is part of the company's freehold; *Thornton* would be a trespasser in the company's shed.

Again, the memorandum of deposit is a "debenture" within the meaning of sect. 17 of the Act of 1882, and is therefore excepted from the Act. It contains an admission of indebtedness by the company to the bank, and gives the bank a charge on the company's property: *Edmonds* v. *Blaina Furnaces Company* (1); *Levy* v. *Abercorris Slate and Slab Company* (2).

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manual labour is exercised by way of trade, or for purposes of gain, in or incidental to the following purposes or any of them; that is to say,

"(*a.*) In or incidental to the making any article or part of an article; or

"(*b.*) In or incidental to the altering, repairing, ornamenting, finishing, of any article; or

"(*c.*) In or incidental to the adapting for sale any article."

Sect. 17 of the *Bills of Sale Act* (1878) *Amendment Act*, 1882, provides that "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock or goods, chattels, and effects of such company."

(1) 36 Ch. D. 215.

(2) *Ante*, p. 260.

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H. Tindal Atkinson, for the execution creditors:—

The machinery in question is within the definition of personal chattels contained in sect. 4 of the Act of 1878. A "fixture" is something which is affixed to the soil of the owner of the freehold. The machinery in question is certainly not physically affixed to the freehold of the company. If the company were to cease working the clay, *Thornton* would be entitled to have the machinery removed from his land. In *Wake* v. *Hall* (1) it was held that some machinery and buildings, which had been attached by miners to surface land, to the exclusive use of which land the miners were entitled for mining purposes, but the freehold of which belonged to others, could be pulled down and removed by the miners while their interest in the mines continued. The House of Lords was of opinion that the machinery and buildings were personal chattels and liable to execution.

The doctrines relating to fixtures cannot apply to a case in which the articles in question are not affixed to that which is the subject-matter of the assignment or demise. There is no written document which gives the bank a charge on the machinery.

[NORTH, J.:—The memorandum of deposit amounts to a charge on the company's interest in the property.]

Sect. 5 of the Act of 1878 must be read in conjunction with sect. 4, which covers every kind of fixture or chattel which is not assigned with the soil to which it is affixed. The machinery in question was not affixed to any soil which was assigned to the bank; it was affixed to soil which belonged, not to the company, but to a different owner.

Sect. 5 only excludes the particular descriptions of "trade machinery" mentioned in it when they are assigned with land to which they are affixed, and it has no application to the present case.

The memorandum of deposit was not intended as a "debenture." It contains no undertaking by the company to pay any specific sum. Every element of a "debenture" is wanting. The question is one of intention.

(1) 8 App. Cas. 195.

Ashton Cross, in reply:—

In *Levy* v. *Abercorris Slate and Slab Company* (1) the instrument in question contained an agreement by the company to issue debentures, which tended to shew that the document itself was not intended as a debenture, and yet it was held to be a debenture.

I rely mainly on sect. 5 of the Act of 1878, the effect of which is to except the particular kinds of "trade machinery" which are thereby excluded, not merely from sect. 4, but from the operation of the Act altogether. The excluded articles are not to be "deemed to be personal chattels within the meaning of the Act" for any purpose.

1887. Dec. 12. NORTH, J.:—

The real questions to be decided in this case turn upon the construction of some of the sections of the *Bills of Sale Acts* of 1878 and 1882.

[After stating the facts, his Lordship continued:—] The machinery in question was erected by the company on the surface of the land, and it is admitted that the coal and fire-clay, the interest of *Tattersall* in which was sold to the company, lie at some distance below the surface, and therefore they are separated by other minerals, belonging either to the lord or to some one else, from the surface which belongs to *Thornton*. As I read sect. 35 of the Inclosure Act, the right to use the surface and the right to raise the minerals are totally different things, and there is nothing in the Act which limits the lord's power of using the surface to the surface lying directly over the mines and minerals which are being worked. If fire-clay or coal cropped out on the side of a hill it might be more convenient for the purpose of working it to make a shaft or level horizontally, or to sink it at an angle, instead of perpendicularly, and sect. 35 would, I think, enable the lord to use the surface, even though it did not lie exactly over the minerals which were being got. But in the present case the part of the surface which is used by the company is that of land belonging to *Thornton*, lying at some distance above, but vertically above, the coal or fire-clay which is being got.

The bank claim the machinery in question as having been put

(1) *Ante*, p. 260.

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upon their land, and their claim is rested upon the case of *Meux* v. *Jacobs* (1). I should have thought that it was at least deserving of argument whether and how far that case applies to fixtures which are not annexed to the land mortgaged, but are upon another tenement not belonging to the same owner, an dnot even abutting on the mortgaged land. But Mr. *Atkinson* made no comment upon that case, and confined his argument to the point raised in paragraph 4 of the admissions, that the security of the bank is void by reason of the *Bills of Sale Acts*. That paragraph of the admissions agreed upon by the parties, after referring to the memorandum of deposit, states that "The bank claims that, by virtue of the deposit of the documents mentioned in the schedule thereto, it was thenceforward entitled in equity to all the property of the company, including the fixtures hereinbefore mentioned, and could demand a legal assurance thereof at any time; but the execution creditors contend that the memorandum, even if binding on the company, which is not admitted, confers no title on the bank as against the execution creditors, and further that such fixtures and machinery are removable and liable to execution as chattels." It is admitted that the equitable security of the bank has not been registered under the *Bills of Sale Acts*. But the bank say that registration of their security was not necessary, and the argument was put on two different grounds.

I will deal first with the contention that this memorandum is a "debenture," and is therefore excepted from the operation of the *Bills of Sale Acts*. That depends upon sect. 17 of the Act of 1882, and the question arises what is a "debenture"? It was held by Mr. Justice *Chitty* in *Edmonds* v. *Blaina Furnaces Company* (2) that a memorandum of agreement, which contained a covenant by a company to pay to each of nine persons, who were mentioned in the agreement as lenders, the sum of money set opposite his name, *pari passu*, and which charged all the property of the company as security for the payment thereof, was a debenture. I feel some little difficulty in following that decision, for this reason: it was held by Mr. Justice *Field* in Chambers in *Brocklehurst* v. *Railway Printing and Publishing Company* (3), and by the Court

(1) Law Rep. 7 H. L. 481. (2) 36 Ch. D. 215. (3) W. N. 1884, p. 70.

of Appeal in *Ross* v. *Army and Navy Hotel Company* (1), that the covering deed, which usually accompanies debentures as a security for the payment of the debentures when due, is not a "debenture" within sect. 17; but requires registration under the *Bills of Sale Acts* if it deals with personal chattels, and is void if not registered. I feel a difficulty in seeing how, if a covering deed is not a "debenture," an agreement which contains substantially the material parts of a covering deed, viz., the agreement to pay the several persons named *pari passu*, and the charging of the debts upon the property of the company—can be a debenture. Another difficulty arises in this way. In *Ross* v. *Army and Navy Hotel Company* it was treated by the Court of Appeal as at least an open question whether an instrument which charged specific property of the company, as distinguished from a general charge on all its capital, stock or goods, chattels, and effects, could be a "debenture": and in the present case the property charged is very specific; it consists of the company's interest in certain lands, and the agreement does not charge any chattels at all, except so far as the mortgage of the lands affects the chattels which are affixed to it. I feel this further difficulty as regards sect. 17. It says "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company." Why are "mortgage" and "loan" companies mentioned? It is difficult to see why such companies should be mentioned specifically, if the words "other incorporated company" were meant to include every company whatever; if the debentures of every company were to be free from the restrictions of the Act. It was suggested by Mr. Justice *Grove* in *Jenkinson* v. *Brandley Mining Company* (2), that the words "other incorporated company" would mean any incorporated company *ejusdem generis* with mortgage and loan companies. I have great difficulty in comprehending what is a company *ejusdem generis* with mortgage and loan companies. By a loan company I understand a company whose principal business, or one of whose chief businesses, is to lend money, and I suppose a mortgage company is a company whose business is to lend money on mortgage, but what other companies are companies *ejusdem generis* with companies

(1) 34 Ch. D. 43. (2) 19 Q. B. D. 568.

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which lend money on mortgage or otherwise I do not know, nor can I see upon what ground a company which lends money should have a greater latitude as regards its powers of borrowing money on debenture and giving security by debenture for the money it borrows than any other incorporated company.

Moreover, according to the view expressed by Mr. Justice *Chitty* in *Edmonds* v. *Blaina Furnaces Company* (1), the word "debenture" has no precise legal definition, but always imports an acknowledgment of a debt and generally, if not always, a covenant or an agreement to pay. In the present case I do not find that the memorandum contains an acknowledgment of any debt. It is quite true that the memorandum was given for the purpose of securing the then present advance of the bank to the company, and any other sums which might become due from the company to the bank, but there is no reference to any specific sum. One does not know what was the exact amount due to the bank at the moment at which the document was executed, and from that time forward the sum secured would no doubt vary from day to day, for it is a security for the balance of the current account to a limited amount, having regard to the stamp placed upon the document. Nor do I find in the document any agreement by the company to pay. It is true that there is an agreement to give a legal mortgage when requested, and a legal mortgage would, no doubt, contain a covenant by the company to pay the debt, but that is very indirect, and I do not find that the document itself contains any agreement to pay the debt. Its object was, not to give a security by way of an agreement or covenant to pay, but to give a charge upon certain property of the company.

Having regard to these considerations, I feel myself unable at present to hold that a mere memorandum in writing, by a coal and fire-clay working and brick-making company, of a deposit with their bankers of documents of title relating to certain specific beds of coal and fire-clay, as a security for the balance which they might then or thereafter owe to their bankers on their current account—but which does not admit any specific debt, or contain any agreement to pay, otherwise than by an agreement

(1) 36 Ch. D. 215.

to execute a legal mortgage—is an instrument excepted by the words of sect. 17 from the operation of the Act.

The next question is, whether this memorandum required registration under the *Bills of Sale Acts;* and that depends upon whether it is "a bill of sale of personal chattels" within the meaning of sect. 4 of the Act of 1878. Looking at the definition contained in that section, this memorandum is beyond all question a bill of sale, if it relates to "personal chattels" as defined by the Act. The definition of personal chattels may be said to divide "fixtures" roughly into fixtures separately assigned (and what a "separate assignment" means is shewn by sect. 7 of the Act) and fixtures which are not separately assigned. That is not a complete division, because, curiously enough, "fixtures" are only excepted from the expression "personal chattels" "when assigned together with a freehold or leasehold interest in any land or building to which they are affixed," and there might be fixtures assigned together with an interest in copyhold land. But, leaving that out of consideration, I think one may treat the definition as roughly dividing fixtures into two classes, those separately assigned, and those assigned together with the land or building to which they are affixed. In the former case they are "personal chattels;" in the latter they are not. But then there is a further exception, because the provision is that personal chattels shall not include fixtures, when assigned together with a freehold or leasehold interest in land "(except trade machinery as hereinafter defined)." Then we must turn to sect. 5 to see what is meant by "trade machinery." That section begins by saying that "trade machinery shall, for the purposes of this Act, be deemed to be personal chattels." If we look at those words alone, all "trade machinery" is included in the expression "personal chattels." But sect. 5 goes on, "For the purposes of the Act 'trade machinery' means the machinery used in or attached to any factory or workshop," and it is clear from the subsequent definition of the words "factory or workshop," that the machinery which the sheriff has seized is machinery of that kind. It is used in a place where bricks are made, and incidentally to the making of bricks and adapting the clay for sale. And then follows this exception, "exclusive of"—to put it shortly—

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"fixed motive powers," "fixed power machinery," and "steam, gas, and water pipes." It is admitted that all the articles about which the present question arises come within the description of machinery or effects excluded by the section from the definition of "trade machinery." But it is argued that the "trade machinery" thus excluded is merely such "trade machinery" as, but for the exclusion, would come within the description contained in sect. 4 of "fixtures not separately assigned," sects. 4 and 5 being read together; and that sect. 5 therefore has no application to a case where, as here, the machinery is not affixed to the freehold interest, and does not come within the description of "fixtures assigned together with a freehold interest in land to which they are affixed." There are, however, some other words in sect. 5 which I have not yet read, which seem to me conclusive upon the point, I mean these words, "The machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act." Those words seem to me to be clear and definite, and I must hold that the articles in question, being all "machinery or effects excluded by this section from the definition of trade machinery," are not "personal chattels" within the meaning of the Act for any purpose whatever; and therefore any document, whatever it may be, which assigns them is not an assurance of "personal chattels" within the meaning of the Act. I hold, therefore, that this memorandum of deposit, not being an "assurance of personal chattels" within the meaning of the Act, did not require registration.

The result is, that the claim of the bank succeeds, and the execution creditors are not entitled to these articles.

H. Tindal Atkinson asked for leave to appeal. The question being one of law, and the facts not being in dispute, rule 9 of Order LVII. of the Rules of Supreme Court, 1883, applies.

NORTH, J.:—I understood I was trying the case under rule 8.

Tindal Atkinson:—If that be so, there could be no appeal, even with leave: *Lyon* v. *Morris* (1). But there has been no consent

(1) 19 Q. B. D. 139.

on the part of the claimants, and in practice the rule has been that, in the absence of consent, rule 8 applies only when the value of the property in dispute does not exceed £50. Here it considerably exceeds that amount.

NORTH, J.:—Even if the case comes under rule 9, I do not think I ought to give leave to appeal. I do not entertain any doubt whatever as to the meaning of the words of sect. 5 of the *Bills of Sale Act*, 1878, "the machinery or effects excluded by this section from the definition of trade machinery shall not be deemed to be personal chattels within the meaning of this Act."

Solicitors for Sheriff: *Bell, Brodrick & Gray.*

Solicitors for Bank: *Speechly, Mumford & Landon*, agents for *Mumford & Johnson, Bradford.*

Solicitors for Execution Creditors: *Yewdall & Son, London* and *Bradford.*

W. L. C.

SACHS *v.* SPEILMAN.

[1887 S. 8344.]

Practice—Pleading—Rules of Supreme Court, 1883, *Order* XIX., *rr.* 6, 7—*Principal and Agent—Fraud—Particulars.*

The statement of claim, in an action by a principal against his stockbrokers to open settled accounts, alleged fraud, and that the Plaintiff was unable to give particulars before discovery. An application by the Defendants for particulars was ordered to stand over till a statement of defence had been put in.

A defendant by delivering his statement of defence does not waive hi right to particulars.

THIS was an action by a principal against his stockbrokers. A statement of claim had been put in, which was as follows:

"1. From the month of September, 1882, to the month of March, 1885, the Plaintiff employed the Defendants for commission as his stockbrokers to buy and sell and to carry over purchases and sales of stocks, shares, and securities for the Plaintiff, subject to the rules and regulations of the *London Stock Exchange.*

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"2. The Defendants, in breach of the terms of their employment at the time they purported to act as the Plaintiff's agents acted as principals in many of the transactions in which they were employed, and charged the Plaintiff with moneys with which they were not entitled to charge him, and did not credit him with moneys with which he was entitled to credit.

"3. The Defendants from time to time delivered to the Plaintiff accounts containing accounts of such transactions, as if they had been entered into by them for the Plaintiff in accordance with the terms of their employment, but in which they or some one or more of them had really acted as principals, and these accounts were from time to time settled by the Plaintiff in ignorance of the premises.

"4. The particulars of such transactions are known to the Defendants, but are not known to the Plaintiff, and until the Plaintiff has obtained discovery and inspection of the Defendants' books and other documents, and examined the Defendants by interrogatories, he cannot state the particulars of such transactions; but the Plaintiff does not complain of the purchase, carrying over, and sale of £10,000 first preference stock of the *Grand Trunk Railway Company of Canada*, bought on or about the 25th day of February, 1885."

The Plaintiff claimed an account of and payment of what should be found due, and damages.

The Defendants had taken out a summons for particulars. An order had been made in Chambers that the summons should stand over till seven days after a statement of defence should have been put in.

This was a motion on the part of the Defendants that the order made in Chambers should be discharged, and for an order that the Plaintiff deliver to the Defendants, within seven days of the order to be made, "particulars of the transactions in which the Defendants charged the Plaintiff with moneys with which they were not entitled to charge him, and did not credit him with moneys with which he was entitled to credit, referred to in par. 2 of the statement of claim," and that the Defendants might have a month's further time for putting their statement of defence, or in the alternative that the second paragraph of the statement of

claim might be struck out as embarrassing, or that the action should be dismissed on the ground that it disclosed no reasonable cause of action, and was frivolous and vexatious.

Cozens-Hardy, Q.C., and *Grosvenor Woods*, for the Defendants:—

A plaintiff is not allowed to bring a fishing action, charging fraud. He must not rely on general allegations, but must state instances precisely. The Defendants are, at this stage, entitled to particulars under Order XIX., rule 6. That rule is one of pleading. If the Defendants put in their statement of defence before they know the particulars alleged, they will be taken to have waived their right to particulars. The cases of *Whyte* v. *Ahrens* (1) and *Leitch* v. *Abbott* (2) were referred to.

Cookson, Q.C., and *Wood Hill*, for the Plaintiff:—

The two cases cited are authorities that, in an action like this, where from the nature of the case the Plaintiff is ignorant of details, and the Defendants have complete means of knowledge, he is not bound to deliver particulars till he has obtained the discovery which will enable him to do so properly. If there is any technical difficulty as to the Defendants being prejudiced as matter of pleading by putting in their statement of defence before particulars are given by the Plaintiff, the Plaintiff will undertake not to take advantage of the technicality.

Cozens-Hardy, in reply.

1887. Dec. 12. NORTH, J.:—

The Defendants ask for relief under three heads. First of all they ask for delivery of particulars; secondly, to strike out the statement of claim as embarrassing; and, thirdly, to dismiss the action as frivolous and vexatious. As regards the first point, the case is rested on Order XIX., rule 6, which provides that "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary

(1) 26 Ch. D. 717. (2) 31 Ch. D. 374.

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beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading." It does not say what is to happen if there is any non-compliance with that order. Then the next rule must be looked at, which provides that "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just." Then rule 26 of the same order provides that "no technical objection shall be raised to any pleading on the ground of any alleged want of form;" and rule 27 says, "The Court or a Judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action." Then Order LXX., rule 1, provides that "non-compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit."

The first question is whether there is a sufficient statement of particulars under rule 6 standing alone. Now I must say, if the matter stood free from authority, that I should have thought this pleading not sufficiently particular and precise for the purposes of the trial, and that further particulars should be given. But I observe that Vice-Chancellor *Bacon*, in the case of *Whyte* v. *Ahrens* (1), and Lord Justice *Cotton* in the same case, and also in *Leitch* v. *Abbott* (2), considered that a general statement such as is to be found here might be considered to be sufficient. I do not think it necessary at present to decide that point. The question now really is whether the order made in Chambers is right, by which I did not reject the Defendants' demand for particulars, but postponed the consideration of that question until I knew what the issues raised by the defence were.

Two cases were cited, and relied upon by the Plaintiff, which

(1) 26 Ch. D. 717. (2) 31 Ch. D. 374.

seem to me very much in point. In *Whyte* v. *Ahrens* (1) the facts were these: The plaintiffs employed the defendants to purchase goods as their agents, at the lowest possible prices. The plaintiffs sued for an account, and in their statement of claim alleged that the defendants had purchased goods at prices higher than the current prices, and had secretly received from the vendors allowances or commissions. The charges against the defendants were stated in general terms, no details being mentioned. The defence denied the statements of the plaintiffs, and pleaded settled accounts; and then the plaintiffs, before putting in a reply, took out a summons for discovery of documents, and that summons was adjourned into Court. The defendants also applied for particulars of the fraud alleged, and this application was ordered to stand over. The Vice-Chancellor held that the plaintiffs were entitled to discovery before they had to do anything further. Lord Justice *Cotton* took the same view, and what he says upon the point is this (2): "It was said that if this goes to the hearing, there being no particular allegation of fraud, the plaintiffs, even if they proved any particular items of fraud, would not be entitled to set aside the account. I will assume that that is so, though I doubt whether there are not particular statements of fraud. But assume that that is so, then Order XIX., rule 6, is relied on, which says that a party must state in his pleadings, if he relies on fraud, the particulars of that fraud. Here there has been an application for particulars, and that application has been ordered to stand over till the production of those books. Taking the two together, I think that is right. The production of the books will enable the plaintiffs to define and state what it is they require the defendants to meet at the hearing, and they must do that before the hearing, in order to enable the defendants to meet it. But as it is conceded that according to the old practice in this state of the pleadings an order would have been made for the production of documents material to the question to be tried at the hearing, though at present, from ignorance of what has taken place, the plaintiffs are not able to particularise them, so here, in my opinion, the Judge was right in saying, notwithstanding the discretion given him by rule 20 of Order

(1) 26 Ch. D. 717. (2) 26 Ch. D. 721.

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XXXI., that he would make an order for the production of the documents."

In that case, no doubt, Lord Justice *Fry* took a different view. The view of Lord Justice *Cotton* prevailed, because he agreed with Vice-Chancellor *Bacon*, and there were only two Judges in the Court of Appeal.

The other case is, in its circumstances, very like the present. That is *Leitch* v. *Abbott* (1). There the plaintiff *Leitch* alleged that he had employed *Abbott* as his stockbroker in the purchase and sale of shares and securities; that *Abbott* had, in breach of the terms of his employment, acted as principal in many of the transactions in which he was employed by *Leitch*, and charged *Leitch* with moneys not paid, and with sums in excess of the market price; and *Leitch* claimed an account, and payment of what should be found due, and damages. The defendant by his statement of defence indirectly admitted that he had been so employed, but denied all the allegations of having dealt with himself as principal, and all other improper conduct; and set up settled accounts.

Then there were interrogatories which the defendant declined to answer, and Mr. Justice *Chitty* refused to make any order that he should answer; but the Court of Appeal took a different view. Lord Justice *Cotton* says (2): "The contention of the defendant comes to this, that the Judge is to decide whether he did or did not act in violation of his duty before he gives the discovery. It is said that *Whyte* v. *Ahrens* (3) is an authority for this proposition. The defendant cannot, however, well rely on my judgment in that case, for, if the Judge had a discretion, I think it has been wrongly exercised here. But no doubt Lord Justice *Fry* did in that case think that fraud being alleged by the plaintiff, particulars of the fraud ought to have been given before he could be entitled to discovery. Is that the effect of rule 6 of Order XIX.? There is here a general allegation of fraud, and the plaintiff wants the discovery to enable him to prove his allegation. It may be that he will afterwards have to amend his pleadings, but to say that he must give details of the fraud in

(1) 31 Ch. D. 374. (2) 31 Ch. D. 376.
(3) 26 Ch. D. 717.

the first instance would be to reduce the right of discovery in cases of fraud to very narrow limits indeed. I do not, however, think that that case applies, for there is here a statement of the nature of the fraud alleged." There is no practical distinction between the statement there and the statement in the present case. "The plaintiff may hereafter have to condescend to particulars, but, in my opinion, it would be wrong to say that he is not entitled to have this discovery now, because he has not given full details of the fraud which he alleges. We may possibly have to decide to what extent the defendant is obliged to go into all these matters, but, in my opinion, it would be wrong to say that the Court has a discretion to deprive the plaintiff of discovery altogether, either until the trial of the action, or until he has given details of the fraud which he alleges. He wants the discovery in order to enable him to give those details, and to establish his right to relief at the trial. I think, therefore, that the defendant must give a further answer to the interrogatories."

Then Lord Justice *Bowen* says: "I will assume that the plaintiff is met with an allegation of a settled account which throws upon him the obligation of proving fraud on the part of the defendant, but it does not deprive him of the right to obtain discovery from the defendant, so as to enable him to prove the fraud." Then he refers to a passage from *Wigram* on Discovery (1), and deals first of all with Order XXXI., rule 20. Then he says: "Then arises the question on which Lord Justice *Cotton* and Lord Justice *Fry* are not entirely at one, and I am, therefore, obliged to state my own view. I do not think it necessary to say anything in order to shew that the old rule of pleading is a good rule—that, in order to open a settled account, specific errors in the account must be stated." Then he quotes the case of *Parkinson* v. *Hanbury* (2), and proceeds, "I think rule 6 of Order XIX. is only a rule of pleading, and I believe that this has been so decided by the Court of Appeal. Though the omission of one party to comply with the rule gives a right to the opposite party to complain, yet it is an error in pleading and nothing more, and I should be prepared so to decide, if the point had not already been decided. Ought, then, the generality of an

(1) 2nd Ed. § 26. (2) Law Rep. 2 H. L. 1, 12.

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allegation of fraud to be a bar to the right of discovery? It seems to me that the very fact that the pleader is unable to plead except in general terms, is in many cases the very reason why he should have discovery from the other party, so as to enable him to plead the fraud in detail. If at a particular stage of an action you are stopped by reason of your ignorance of some fact which is known only to the other party, that is the very reason why you should have discovery of that fact from him, and what difference does it make whether you are stopped at the trial or before? I say this in order to shew that rule 6 of Order XIX. is only a rule of pleading, and we ought not, I think, to scan the pleadings too narrowly upon a question of the right to discovery. But being of opinion that in the present case the relation of principal and agent is the real ground of the plaintiff's right to discovery, I cannot see that we ought to deprive the plaintiff of the discovery which he wants in order to enable him to frame his case." Then Lord Justice *Fry* says, "I will only say that the inclination of my opinion is in favour of the judgment of the Court below."

Now it is said that these two cases are not applicable to the present because in both the defence had been put in, and therefore the defendant had waived his right to have the particulars which he sought. It does not appear to me that those cases turned upon any such point. No Judge said that the defendant had waived his right, or put that forward as a reason for the judgment that was given, and not only was that not the ground of decision, but the ground of decision was entirely inconsistent with any such waiver, because although the defence was in, it was held that the right to have particulars delivered after discovery still existed. Instead of there being any waiver of that right by putting in the defence the right was recognised notwithstanding the defence, and the discovery in each case was given for the purpose of enabling the plaintiff to do what the defendants had the right to call on him to do, namely, to give particulars of the fraud complained of. The fact, therefore, that the defence had been put in in those two cases does not in any way distinguish the present case from them.

Then it is said that both those were cases in which the question

actually decided was as to the right to discovery—not a question of the defence. In the present case it is precisely the same. The question now is not what is in issue between the parties. Nobody can say what that is until the defence is seen. That defence may admit that in all or in some of these transactions the allegations in the statement of claim are well founded. It may, on the other hand, of course, deny that they are so; but until I know what matters are in issue between the parties it is impossible for me to say that the plaintiff does not require further information; but it is not wanted to enable the defendant to put in his defence. Particulars by way of amendment cannot be given until after discovery, and I have ordered the summons to stand over until after the defence has been put in in order that I may know what the issues raised by the parties are. The general rule is that discovery is not allowed till after defence: but there are exceptions to that rule: and it follows from the two cases I have stated that if I held it necessary to require the plaintiff to give particulars before the defence is put in, I should also hold that this is one of the cases in which the plaintiff would have the right to have discovery before defence.

Then it is suggested by the notice of motion that the Defendants are embarrassed by the form in which this pleading is framed. But how can it be said that the Defendants are embarrassed by not knowing these details? The Plaintiff has told them in his statement of claim that he has not the means of giving these details. They, on the other hand, are the persons who carried through the transactions, and have in their possession the books containing the full accounts; therefore they have full knowledge and means of knowledge, and can shew precisely what the cases are, if any, in which they did do what the statement of claim alleges they did. I do not see how they can possibly be embarrassed by not obtaining from the Plaintiff the information they have in their own possession. Of course I can see well enough why they press for these particulars. If the Plaintiff were obliged to condescend upon particulars, and to specify the instances in which the Defendants have done what he charges them with, the result might be that from his imperfect knowledge he would not be able to point out in the particulars some cases

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in which they had actually done what he says they have done; and inasmuch as, after particulars were given, their defence would be addressed only to those points, the ignorance of the Plaintiff might relieve the Defendants from being held responsible as to certain matters with respect to which they are open to the charge contained in the statement of claim.

There is authority which bears on this question in the case of *Thompson* v. *Birkley* (1). An action was brought to recover damages for the seduction of the plaintiff's daughter, and it was alleged that the defendant seduced her, and debauched her on various occasions. An application was made by the defendant that the plaintiff should give particulars of the times when, places where, and the manner in which the debauching took place, stating when the seduction took place also. The Master declined to order any particulars, there being no statement by affidavit that the defendant had not seduced the daughter of the plaintiff. The Judge also declined to order such particulars. Then the matter came before the Divisional Court, still without any affidavit, and the judgment of Mr. Justice *Hawkins* was this: "This appeal must be dismissed. The Master declined to entertain the application for particulars unless the defendant made an affidavit that he had not seduced the girl. In other words, the Master required an affidavit to satisfy him that the defendant would be embarrassed in his defence by reason of his having no knowledge of the charges made against him. The Judge ordered some particulars, but refused to order the particulars now sought for. There are no grounds for this appeal. There is no affidavit that the defendant does not know the nature of the charges against him, and that he will be embarrassed in his defence at the trial. The plaintiff alleges that the seduction took place while his daughter was in the defendant's service. The date of the birth of the child has been furnished voluntarily during the hearing. The whole of the matters are alleged to have taken place while the girl was in the defendant's house. It is very difficult for the plaintiff in those circumstances to give such particulars as are asked. The claim states a series of acts of indecency, terminating in the birth of the child. No one knows better than the defendant as to the

(1) 31 W. R. 230.

truth of all these matters. So if he wants these particulars let him make an affidavit, and if it appears from it that he knows nothing about these charges, he will get particulars."

Then Mr. Justice *Watkin Williams* says: "I concur. The order is right. The object of particulars is to prevent surprise at the trial and to limit the inquiry at the trial to the matters set out in the particulars. So I think particulars ought to be encouraged. They tend to narrow the issues. The proper principle is to order particulars only when from the nature of the case they are necessary to limit the inquiry, or are necessary by reason of matters brought forward on affidavit. Here there is nothing of the sort. If the defendant had shewn that he would be placed at a disadvantage by not having these particulars, then he would lay a foundation for his application. But he has not done so."

The present case is a stronger one. In that case the matters with respect to which the defendant sought particulars were in the knowledge of the defendant, but they were in the knowledge of the plaintiff also. In the present case the particulars in question are all in the knowledge of the Defendants, but not in the knowledge of the Plaintiff. Therefore this is an *à fortiori* case, in which the Plaintiff must have the opportunity of knowing what the facts are, in order to enable him to furnish particulars if necessary. It is clear to me that the Defendants cannot be embarrassed; and there is no affidavit, or anything else, before me to suggest that there can be any embarrassment whatever in putting in the defence before the particulars are furnished. It therefore is a case in which the defence ought to be put in before particulars are ordered, and I abide by the order in Chambers.

Then there is the third part of the case, as to the action being dismissed on the ground that there is no cause of action, and that it is frivolous and vexatious. That depends on Order xxv., rule 4, which is this: "The Court or a Judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shewn by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

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In the present case there is no doubt whatever that the statement of claim discloses a sufficient cause of action; and as to its being vexatious, the only thing that I can see vexatious is this attempt on the part of the Defendants to embarrass the Plaintiff in his proceedings by this application to me in Chambers, and the pertinacity shewn in bringing the same matter before me again in Court. Under these circumstances the application fails altogether, and must be dismissed; the Plaintiff's costs to be his in any event.

Solicitors for Defendants: *Tatham, Son, & Lousada.*
Solicitors for Plaintiff: *Dawes & Sons.*

D. P.

NORTH, J. 1887 *Dec.* 14.

In re HAYNES.
KEMP *v.* HAYNES.

[1887 H. 1285.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 51—*Forfeiture Clause—Non-residence.*

A tenant for life under a will broke the terms of a condition of residence on pain of forfeiture contained in the will:—

Held, that, no sale having been made, the forfeiture took effect, notwithstanding sect. 51 of the *Settled Land Act*, 1882.

THIS was an administration action.

Richard Haynes, the testator in the action, by his will, dated July, 1877, gave his wife *Alice Woolley Haynes*, an annuity of £500 for life. He gave her a further annuity in the following terms:—

"I also give, devise, and bequeath to her in the event of there being any child of mine living at my decease or born in due time afterwards, a further annuity of £200 until the death of my said wife, or until she shall marry again, or until the death of all my children under the age of twenty-one years, or until all my children who shall live to attain the age of twenty-one years shall have attained such age, or until she shall assign, charge, or incumber the same, or deprive herself of the benefit thereof in such manner as is hereinafter described with respect to the

annuities hereinafter given or bequeathed, or until my said wife shall fail to comply with the directions hereinafter given in respect of her residence and conduct, in which or any or either of which cases the said annuity of £200 shall cease and determine."

The testator by his will settled such estate. In the first place he limited a term of 1000 years in a trustee for, among other purposes, giving his wife a conditional life interest in part of the property on the following terms:—

"And I declare that the term of 1000 years hereinafter limited to the said *Samuel Mason*, his executors, administrators, and assigns, is so limited to him and them upon trust as to my present dwelling-house with the gardens and appurtenances thereto belonging at *Downend*, together with the coach-house and stables enjoyed therewith, and also my five several cottages in *Downend* with the gardens and appurtenances thereto belonging, four of which are in the occupation of *Isaac Coleman*, *George Hobbs*, *Joel Hale*, *William Powell*, and the other in my own occupation; that the said *Samuel Mason*, his executors, administrators, or assigns, shall in the event of there being any child of mine living at my decease or born in due time afterwards, permit my said wife to occupy and enjoy the said dwelling-house and to occupy or receive the rents and profits of the said cottages until her death or until she shall marry again, or until the death of all my children under the age of twenty-one years, or until the youngest of my children who shall live to attain the age of twenty-one years or to be married, shall have attained that age or been married, or until my said wife shall fail to comply with any of the directions hereinafter given in respect of her residence and conduct, in which or any or either of the said cases this trust in her favour shall cease and determine."

The directions in respect of residence and conduct referred to contained in a subsequent part of the will were as follows:—

"Provided always, and I direct that my wife shall during the continuance of her estate or interest of and in my said house and cottages at *Downend* under the trust of the said term of 1000 years in that behalf declared, reside at my said house, and shall not absent herself therefrom for more than three calendar months

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in any one year, or for more than three calendar months continuously at any one time, and also that she shall not entertain or permit to reside at my house her sister Mrs. *Burton*, or the present or any future husband of the said Mrs. *Burton*, or any children or child of the said Mrs. *Burton* or of her said husband for more than one week in any one year or more than one week continuously at any one time. And I direct and hereby declare my will to be that in case my said wife shall disobey the above directions or any of them the estate and interest herein devised and bequeathed to or in trust for her, as well in the said house and cottages as in any furniture, chattels, and effects in and about the said dwelling-house and in the said annuity of £200, shall forthwith cease and determine in the same manner as though she had died."

The testator's widow had not complied with the terms of residence sought to be imposed on her by the testator. A summons was now heard to decide whether the annuity of £200 and the trusts in the testator's will to allow the testator's widow to occupy the house at *Downend* and receive the rents of the two cottages there, had, in the events which had happened, determined.

Napier Higgins, Q.C., and *A. L. Ellis*, for Mrs. *Haynes*:—

A condition of residence attempted to be imposed on a tenant for life on pain of forfeiture is under the *Settled Land Act* absolutely and totally void: *In re Paget's Settled Estates* (1). The effect of such a condition would, if only voidable by sale, impede and hamper the tenant for life in selling to the best advantage, for it would prevent his postponing a sale till, it may be, the sale would be effected at the proper time on the most advantageous terms.

[NORTH, J.:—Independently of the Act, would the condition of residence till sale and the provision for forfeiture on breach of the condition by a tenant for life with a power of sale be bad?]

It is not necessary to say that it would; for the settlor could, subject to the rules against perpetuity, impose what conditions he chose. Taking the whole of sect. 51, the object is to allow

(1) 30 Ch. D. 161.

as free sale as possible; that object cannot be attained without making such conditions void altogether; and the 2nd sub-section of sect. 51 seems to confirm that view.

Giffard, Q.C., and *Heath*, for persons interested in remainder, were not called on.

NORTH, J.:—

I do not entertain any doubt on the question. Before the passing of the *Settled Land Act* it was perfectly legal for a testator or any other person to impose such terms of residence upon another person whom he intended to take a benefit under a will or settlement as would in fact prevent that person from dealing with the property, inasmuch as in case of ceasing to reside the whole or part of his interest might be taken away from him on account of his doing so. The object of the Act was to give an absolute power of disposition to a tenant for life; and it was intended that a tenant for life should have such absolute power of disposition, notwithstanding any device that might be resorted to by the settlor or his astute advisers to defeat such power.

For this end it was necessary to defeat any scheme devised by means of a provision for compulsory residence as a condition of enjoyment, by which free disposition would be prevented; and the Act is directed to that. [His Lordship read the section, and proceeded:—]

Now under that it seems to me clear that from the time at which a sale or disposition takes place the attempted fetter on the power of a tenant for life is removed, and that is what I consider Mr. Justice *Pearson* decided in *In re Paget's Settled Estates* (1). He says (2): "It is impossible to say that this clause, which defeats the estate of the son, in case he fails to comply with the condition as to residence, does not tend to induce him to abstain from exercising the power of sale which is conferred on him by the Act. The condition is therefore made void by sect. 51, and, if the son exercises the power of sale, his interest in the proceeds of sale will by virtue of sub-sect. 2 continue." Now, I asked counsel in which way it could have been

(1) 30 Ch. D. 161. (2) 30 Ch. D. 164.

NORTH, J. 1887 *In re* HAYNES. KEMP *v.* HAYNES.

said before the Act that a provision for residence till sale, coupled with an express power of selling given to a tenant for life, would have hampered or been inconsistent with the power to sell, or fettered the exercise of it. That question was not in any way answered, and it does not seem to me that a condition of residence while the property is undisposed of is inconsistent with its being properly disposed of. The existence of such a condition could not tend to defer a sale; while it probably might accelerate it. The tenant for life has admittedly done what is a breach of the condition, and the life interest of Mrs. *Haynes*, both in the annuity of £200 and the real estate, have ceased and determined; and though the condition of residence, so far as it purports to prevent the tenant for life from exercising the power of sale, is absolutely void, yet so far as it does not interfere with or hinder the tenant for life from disposing of the property, the condition is effectual.

Solicitors: *Rowcliffes, Rawle, & Co.*; *Phelps, Sidgwick, & Biddle.*

D. P.

NORTH, J. 1887 *Dec.* 15, 16.

In re LARKING. LARKING *v.* LARKING.

[1887 L. 3705.]

Will—Ademption—Lunacy.

A testator bequeathed a policy on his own life on trust to pay two debts due from him, and to pay the balance of the money to be received on the policy, if any, to his daughter *J.* The testator paid off one debt; he became lunatic; his committee paid off the other debt:—

Held, that *J.* was entitled to the money received on the policy, less the debt paid by the committee.

THIS was an originating summons to determine questions under the will of *John Larking*, who died in February, 1887, his will, which was dated 1883, contained the following bequest:—

"I direct my said executors and trustees to stand possessed of my policy of assurance on my own life in the *National Provident Institution* for two hundred pounds, and the bonus thereon, upon trust to receive the money payable under the same and thereout in the first place to pay to my sister *Jane Larking* the sum of

two hundred pounds, due from me to her together with the interest thereon, and in the next place to pay to *Ann Austen* the moneys which I hold in trust for her together with interest thereon, and then to pay the surplus, if any, to my daughter the said *Jane Larking* for her own absolute benefit."

The Plaintiff was *Jane Larking* the testator's daughter. The Defendants were *James William Larking* the surviving executor, and some beneficiaries including the residuary legatee. The executor had received the sum of £326 7*s.* in respect of the policy. The sum of £257 0*s.* 6*d.* being the principal sum of £200 due to the testator's sister *Jane Larking* with interest, had been paid by him in December, 1884. He was afterwards found lunatic. During the year 1886 the committee of his estate paid, out of the general assets of the lunatic, the debt of £50 due to *Jane Austen*, no interest being in arrear. No order had been made in lunacy sanctioning such payment.

One question raised on this summons was whether the Plaintiff was entitled to the whole of the £326 7*s.*, received in respect of the policy, or whether the sums paid to the testator's sister *Jane Larking* and to *Jane Austen*, or either of them ought to be deducted.

Heath, for the Plaintiff:—

As to the debt of £200 paid off by the testator himself, there can be no doubt that residue of the policy receivable by the Plaintiff is to that extent increased. As to the debt paid by the committee, I admit that where there is no duty cast on the committee, he cannot of his own act, without the authority of the Court in lunacy, alter the rights of the parties entitled on the death of the lunatic: *Browne* v. *Groombridge* (1); *Jenkins* v. *Jones* (2); but here there was a debt which it was the duty of the committee to pay.

Levett, for the Defendants, was not called on.

NORTH, J.:—

As far as the £200 was concerned, that was actually paid by the testator himself, before he became lunatic, and the debt ceased to

(1) 4 Madd. 495. (2) Law Rep. 2 Eq. 323.

NORTH, J.

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In re LARKING. LARKING *v.* LARKING.

exist, and cannot be paid out of the moneys received on the policy.

As to the £50 with interest, that stands in a different position. That sum the testator was liable to pay, and he intended it should be paid out of the policy moneys; and if nothing had been done at his death, it would have been necessary to pay that sum out of the moneys received on the policy. But what happened was that he became a lunatic, and the committee in his lifetime, not in consequence of any pressure, not in consequence of any action, but voluntarily, paid it out of what would have been part of the general personal estate. This act was done by the committee without any authority from the Lords Justices. In my opinion that act cannot in any way alter the rights of the parties. That sum must be recouped to the general estate out of the policy moneys; and, subject to the deduction of that sum, the Plaintiff will be entitled to the whole benefit of the policy.

Solicitors: *Routh, Stacey & Castle*, agents for *Frederick S. Stenning, Maidstone; Bower, Cotton & Bower*, agents for *Stephens & Urmston, Maidstone.*

D. P.

NORTH, J.

1887

Dec. 17, 20.

In re MILLS' TRUSTS.

Devolution of Trust Estate — Death of Sole Trustee — Copyholds—Death of Trustee between Commencement of Conveyancing and Law of Property Act, 1881, *and passing of Copyhold Act*, 1887—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 30—*Copyhold Act*, 1887 (50 & 51 *Vict. c.* 73), *s.* 45.

The effect of sect. 45 of the *Copyhold Act*, 1887, is to repeal entirely sect. 30 of the *Conveyancing and Law of Property Act*, 1881, as regards copyholds, so that, if a sole trustee of copyholds had died between the commencement of the *Conveyancing and Law of Property Act* and the passing of the *Copyhold Act*, the legal estate in the copyholds, which, by virtue of sect. 30, had on his death devolved upon his personal representatives, was on the passing of the *Copyhold Act* divested from them, and vested in his customary heir or devisee.

But the validity of any disposition of the property made by the personal representatives before the passing of the *Copyhold Act* would be unaffected by that Act.

PETITION under sect. 2 of the *Trustee Extension Act*, 1852 (15 & 16 Vict. c. 55), for an order vesting a copyhold messuage

and premises at *Hackney* in the Petitioner, without any surrender or admittance in respect thereof, on the ground that the persons in whom it was vested on trust for him had wilfully refused or neglected to surrender the same to him for twenty-eight days after a demand made by him for that purpose, and that they still refused or neglected to do so.

Thomas Mills, by his will, dated the 14th of November, 1846, devised the property to *John Watson*, *John Barney*, and *Thomas Gardner* in fee, upon certain trusts therein mentioned. And he appointed *Watson*, *Barney*, and *Gardner* executors of his will. The testator died on the 18th of March, 1847. His will was proved by *Barney* and *Gardner* alone, *Watson* having renounced probate and disclaimed the trusts of the will. On the 7th of December, 1847, *Barney* and *Gardner* were admitted tenants of the property on the Court rolls of the manor of *Hackney*, upon the trusts of the will. On the 24th of June, 1871, *Barney* and *Gardner* being both dead, an order was made by the Court of Chancery appointing *Sophia Thompson*, *J. B. Shillcock*, and *Christopher Eaton* trustees of the will, in the place of *Watson*, *Barney*, and *Gardner*, and vesting the copyhold property devised by the will in them as trustees for the estate therein devised by the will. On the 9th of April, 1872, *Sophia Thompson*, *Shillcock*, and *Eaton* were admitted tenants of the property, upon the trusts of the will. *Shillcock* survived *Sophia Thompson* and *Eaton*, and died on the 24th of April, 1884, having by his will, dated the 10th of January, 1874, appointed his wife *Bethania Shillcock*, and his son *J. W. Shillcock*, executrix and executor thereof. They proved the will, but they were not admitted tenants of the copyhold property.

On the 9th of April, 1883, the persons who considered that, under the trusts of the will of *Thomas Mills*, they were together entitled to the whole equitable interest in the copyhold property, executed a deed by which, for valuable consideration, they purported to convey that interest to *Frederick Bax* in fee. Soon after the execution of this deed, *Bax* requested *J. B. Shillcock*, as the then surviving trustee of the will of *Mills*, to surrender the copyhold property to him, and tendered a memorandum of surrender to *J. B. Shillcock* for execution; but he refused to execute

NORTH, J. 1887 *In re* MILLS' TRUSTS.

the surrender, alleging that the deed of the 9th of April, 1883, had passed to *Bax* only three-fourths of the equitable interest in the property. The extent of the interest conveyed to *Bax* by that deed depended upon the construction of the will of one of the beneficiaries under the will of *Mills*. *J. B. Shillcock* died, as above stated, on the 24th of April, 1884. *Bax*, being desirous of having the legal estate in the copyhold property vested in him, by a written demand, served personally on *Bethania Shillcock* and *J. W. Shillcock* respectively on the 14th of December, 1886, and the 5th of July, 1887, required them forthwith to surrender the property to the use of himself, his heirs and assigns, according to the custom of the manor; offering at the same time to pay their costs of the surrender. They declined to comply with this request, and on the 6th of December, 1887, this petition was presented by *Bax*.

The petition alleged that on the death of *J. B. Shillcock* the legal estate in the copyhold property became, and that it was still, vested in *Bethania Shillcock* and *J. W. Shillcock*. The petition also alleged that, by virtue of the deed of the 9th of April, 1883, the whole of the equitable interest in the property became vested in the Petitioner.

Levett, for the Petitioner:—

At the time of the death of *J. B. Shillcock* the *Conveyancing Act*, 1881, had come into operation, and therefore, by sect. 30 (1) of that Act, the trust estate in the copyhold property vested

(1) Sect. 30 of the *Conveyancing Act*, 1881, provides by sub-sect. 1, that, where an estate of inheritance in any tenements or hereditaments "is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him."

Sub-sect. 3 provides that the section "applies only in cases of death after the commencement of this Act."

Sect. 1 provides that the Act "shall commence and take effect from and immediately after the 31st of December, 1881."

Sect. 45 of the *Copyhold Act*, 1887, which was passed on the 16th of September, 1887, provides that the 30th section of the *Conveyancing Act* of 1881, "shall not apply to land of copyhold or customary tenure vested in the tenant on the Court rolls of any manor upon any trust or by way of mortgage."

on his death in his executors, and, notwithstanding sect. 45 of the *Copyhold Act*, 1887, that estate still remains vested in them.

The Court can dispense with service of the petition on the executors: *In re Crowe's Mortgage* (1).

The equitable title of the Petitioner is clear; there has been a wilful refusal by the executors to surrender the legal estate to him, and he is entitled to the vesting order for which he asks.

1887. Dec. 20. NORTH, J.:—

There are two difficulties in the Petitioner's way. The Petitioner alleges that on the death of *J. B. Shillcock* in 1884 the legal estate in the property vested in his executors by virtue of sect. 30 of the *Conveyancing Act*, 1881, and that it still remains vested in them, notwithstanding sect. 45 of the *Copyhold Act* of last session. The question is, what is the effect of sect. 45 of the *Copyhold Act*, 1887, upon sect. 30 of the *Conveyancing Act*, 1881, as regards copyholds? Sect. 30 contains a provision that that section shall apply "only in cases of death after the commencement of this Act," *i.e.*, after the 31st of December, 1881. There is no similar provision in the *Copyhold Act* of 1887, and it therefore speaks as from the day on which it was passed, *i.e.*, the 16th of September, 1887. The best construction which I am able to put on the two sections is this—that everything which is done between the dates at which the two Acts respectively came into operation must be taken to have been done under the earlier Act. But when, on the 16th of September, 1887, the *Copyhold Act* was passed, sect. 30 of the *Conveyancing Act* ceased to have any application to copyholds. It is now attempted to trace the devolution of the trust estate in this copyhold property under sect. 30 of the Act of 1881, but it seems to me that, by reason of sect. 45 of the Act of 1887, sect. 30 has no longer any application to the devolution of copyholds. If the executors had dealt with the property before the *Copyhold Act* was passed, their disposition of it would have been valid. But, no disposition of the property having been made by them before the passing of the *Copyhold Act*, it seems to me that they have no longer any power to deal with it, and that the devolution of this estate must be traced as if

(1) Law Rep. 13 Eq. 26.

NORTH, J. 1887 *In re* MILLS' TRUSTS.

the *Conveyancing Act* had never been passed, and that the persons who have power to deal with it are those who would have had the power in case that Act had never been passed. The petition is, therefore, based on a wrong assumption as regards the devolution of the legal estate in the property.

There is a difficulty also as to the extent of the Petitioner's beneficial interest in the property. [His Lordship stated the facts relating to the devolution of the beneficial interest in the property, and continued:—] I cannot at present make any order on the petition. I think that there has not been any wilful refusal to surrender the property to the Petitioner, there being a *bonâ fide* doubt as to the extent of his equitable interest in it. I cannot decide what the extent of his interest is in the absence of the persons who are interested in opposing him.

If I had been of opinion that the petition was right in other respects, I should have thought that *In re Crowe's Mortgage* (1) was an authority for dispensing with service on the executors.

Solicitors for Petitioner: *S. D. Ashby & Compton.*

(1) Law Rep. 13 Eq. 26.

W. L. C.

STIRLING, J.
1887
Dec. 9, 15.

In re LLEWELLIN.
LLEWELLIN *v.* WILLIAMS.

[1887 L. 55.]

Settled Land Act, 1882—*Sale of Estate by Tenant for Life—Timber at Valuation—Power to cut Timber—Claim of Tenant for Life to Proceeds of Sale of Timber—Extra Costs of dismissed Action by Remaindermen.*

A tenant for life of an estate in strict settlement had power to cut certain timber and other trees, to sell the same and to apply the produce to his own use. In 1881 he contemplated a sale of the estate, but he was restrained from selling (either under the power in the will or under that contained in the *Settled Land Act*) by an injunction granted in an action brought by persons entitled in remainder. In 1884 the action was dismissed with costs, and in 1885 the tenant for life sold the estate under conditions of sale which stated that the purchaser should in addition to the purchase-money pay for the timber according to a valuation. The tenant for life claimed, under the provisions of the settlement and under the *Settled Land Act*, 1882, s. 35, to be paid out of the purchase-money the value of the timber; and he also claimed to be paid the difference of his costs, as between party and party and solicitor and client, in the action which was dismissed:—

Held, that the amount of the valuation of the timber was an addition to the price which the purchaser agreed to pay for the estate, and must be treated as capital money payable to the trustees under sect. 21 of the *Settled Land Act*, 1882, and that the claim by the tenant for life to be paid the sums asked for failed:

Held, also, that the tenant for life was entitled, in defending the action which was dismissed with costs, to be paid his extra costs of so much of the action as related to the exercise of the powers contained in the *Settled Land Act* as incidental to the exercise of his power of sale under the provisions of the *Settled Land Act*, 1882.

ADJOURNED SUMMONS.

The Rev. *Henry Llewellin*, who died on the 28th of December, 1836, by his will dated the 28th of November, 1836, devised his freehold and copyhold estate, of about 640 acres, situate in the county of *Glamorgan*, to the use of his nephew, *Edward Turberville Llewellin*, and his assigns, during his life, and from and after the determination of that estate by forfeiture or otherwise in his lifetime, to the use of the two trustees in the will named, and their heirs, during the life of *E. T. Llewellin* in trust to support

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the contingent uses and estates thereinafter limited. After making devises to numerous persons, in remainder, the testator said: "And I declare my will and mind to be that no tenant for life in possession of my said real estates under the limitations aforesaid shall have power to commit any manner of waste, spoil, or destruction upon the same, or any part thereof, except that he or she may fell and cut any timber or other trees which may begin to decay, or which may materially injure the underwood, and may sell and dispose of the same, and apply the produce to his or her own use." And the testator also declared that it should be lawful for the trustees and the survivor of them, and the executors and administrators of such survivor, at any time or times, at the request and by the direction of the person or persons (who should have attained the age of twenty-one years) who by virtue of the limitations should for the time being be entitled to the actual freehold of his estates or any part thereof, to dispose of, and convey either by way of absolute sale or in exchange for other hereditaments situate in *England* or *Wales*, all or any part of his estates and the inheritance thereof in fee simple, and if his estates should be sold by the trustees they were to invest the proceeds of sale in the purchase of other hereditaments, which were to be settled upon the trusts in the will or upon the securities in the will mentioned.

In January, 1881, *E. T. Llewellin*, a widower, without issue, and at the time upwards of eighty years old, was in possession of the estate. He contemplated a sale of it under the power conferred by the will, and an investment of the proceeds of sale in consols. Persons entitled to the estate in remainder in May, 1881, brought an action, "*Thomas* v. *Williams*" (1), to restrain the sale. On the hearing before Sir *James Bacon*, V.C., in March, 1883, his Lordship dismissed the action with costs. The plaintiffs in that action gave notice of appeal, and on the 18th of May, 1883, the Court of Appeal granted an injunction restraining the sale either under the power in the will or under that contained in the *Settled Land Act* pending the hearing of the appeal, but as it was not prosecuted, it was, in May, 1884, dismissed with costs. The estate was offered for sale by auction on the 15th of

(1) 24 Ch. D. 558.

December, 1885. One condition (3) was that each purchaser should at the close of the sale pay to the auctioneer a deposit of £10 per cent. on the amount of his purchase-money, and sign an agreement, in the form which was set forth, for the completion of his purchase according to the conditions, and pay the remainder of his purchase-money "and the amount of valuation as hereinafter provided" on the 2nd of February, 1886. Another condition (4) was that each purchaser was "in addition to his purchase-money to pay for all timber and timber-like trees, tellers, pollards, saplings and plantations, if any, down to 1*s.* per stick inclusive, and underwood down to the stem, according to a valuation to be made by valuers" for the vendor and purchaser and their umpire. The 11th condition was that the vendor sold and would convey as a tenant for life in exercise of the powers given to him by the *Settled Land Acts*, 1882 and 1884; the trustees for the purposes of the *Settled Land Act*, 1882, joining in the conveyance for the purpose of acknowledging the receipt of the purchase-money; and the 12th condition was that "on payment of the residue of the purchase-money and the amount of the valuation aforesaid at the time and place aforesaid, each purchaser" should have a proper assurance of the lot or lots purchased by him executed by the vendor and all other necessary parties, if any. The estate was sold by auction on the day named, and there was realized for the land the sum of £18,000, and for the timber thereon the sum of £1404 12*s.* The value of the timber was ascertained by valuation, and it was deposed that £787 18*s.* 8*d.*, part thereof, was at the time of the sale the value of the timber or other trees on the estate which had begun to decay or which materially injured the underwood of the estate. The Plaintiff on the 7th of January, 1887, took out a summons, and after asking, amongst other things which had been disposed of in Chambers, to have the sum of £787 18*s.* 8*d.*, being the value of the timber on the estate to which he, as he alleged, was entitled under the will; and also £154 3*s.* 4*d.*, being one-fourth of £616 13*s.* 4*d.*, the balance arising from the sale of the timber as by sect. 35 of the *Settled Land Act*, 1882 (1), paid to him out of

(1) The 35th section of the *Settled Land Act*, 1882 (45 & 46 Vict. c. 38), enacts that: (1.) "Where a tenant for life is impeachable for waste in respect

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the purchase-moneys; asked to have his costs of the action of "*Thomas* v. *Williams*" [1881 T. 973] taxed as between solicitor and client, and to have the amount by which the same should exceed his costs in that action as between party and party ascertained; and to have such amount, together with any party and party costs which it might be found impossible to obtain from the Plaintiffs in that action, and the costs of this summons and consequent thereon paid to him out of the purchase-moneys.

W. Pearson, Q.C., and *Mulligan*, for the Plaintiff:—

Two questions arise in this case, first, whether the Plaintiff is entitled to any part, and if to any, how much of the purchase-money which was paid for the timber; and secondly, whether he is entitled to be paid all the costs which he incurred and did not recover in the action of *Thomas* v. *Williams* (1). The Plaintiff contemplated a sale of the estate under the power in the will before the *Settled Land Act*, 1882, came into operation in January, 1883, but being restrained by an injunction granted by the Court of Appeal, it was not till after that action was dismissed in May, 1884, that he could proceed to a sale. In that action he was only entitled to party and party costs, and the question is whether he is entitled to be paid the difference between those costs and solicitor and client costs out of the purchase-money, and it is submitted that he is; but if not to those which he incurred before, he is certainly entitled to those which were incurred after the *Settled Land Act*, 1882, came into operation, as sect. 53 imposed upon him the duties and liabilities of a trustee: *Sebright* v. *Thornton* (2); *D'Oechsner* v. *Scott* (3).

There is no doubt that the Plaintiff was put by the action to very considerable expense in defending his right to exercise his power of sale over the estate, and he ought to be indemnified out

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of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the Court, may cut and sell that timber or any part thereof. (2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this Act, and the other fourth part shall go as rents and profits."

(1) 24 Ch. D. 558.

(2) W. N. 1885, p. 176.

(3) 24 Beav. 239.

of the proceeds of sale. Then as to the timber. The Plaintiff was at the time of the sale entitled to cut down the trees which had begun to decay or which materially injured the underwood, to sell the same and apply the proceeds to his own use. The £787 18*s.* 8*d.* represents the timber, which it is alleged was ripe and fit for cutting, and was injuring the estate, and the Plaintiff is entitled to it. The timber was sold at the same time as the land, but for a different consideration; the price was separately ascertained. If it had been sold separately the Plaintiff would, it is submitted, be entitled to the proceeds of it. Under sect. 35 of the *Settled Land Act*, 1882, which governs the case of a tenant who is impeachable for waste, the Plaintiff is entitled to a part of the timber money; but he was not impeachable for waste, having a power to cut timber under the will. There is nothing in the *Settled Land Act* which prevents the Court from saying that the Plaintiff is entitled to the sums which he claims, and he will be entitled to his costs of the summons.

B. B. Rogers, for the trustees, said that they only gave their consent to a sale of the estate; and submitted that the whole proceeds should be paid to them as capital money under sect. 21 of the Act. Their consent was to a sale of the timber with the land.

Hastings, Q.C., and *Christopher James*, for parties interested in remainder:—

The timber was all standing on the estate at the time of sale, and the tenant for life has no interest in the proceeds of the sale of it, whether unimpeachable for waste or not. This question was settled very long ago, as the cases of *Kekewich* v. *Marker* (1), *Cholmeley* v. *Paxton* (2), same case on appeal under the name of *Cockerell* v. *Cholmeley* (3), *Wolf* v. *Hill* (4), and *Doran* v. *Wiltshire* (5) shew.

The *Law of Property and Trustees Relief Amendment Act* (22 & 23 Vict. c. 35), s. 13, may also be referred to.

It was not intended by sect. 35 of the *Settled Land Act* to alter

(1) 3 Mac. & G. 311.
(2) 3 Bing. 207.
(3) 10 B. & C. 564; 1 Cl. & F. 60.
(4) 2 Sw. 149, n.
(5) 3 Sw. 699.

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the law. A tenant for life has no greater right given to him by it than he had before, and the Plaintiff's claim to the timber money must fail. As to the claim for costs, a tenant for life is, under sect. 53, only entitled to be paid those which are incidental to the execution of his powers, and no more. Under sect. 43 trustees may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them, but the Plaintiff was not a trustee of the estate, and he is not entitled under sect. 46, sub-sect. 6, to be indemnified for the costs which he incurred in the action of *Thomas* v. *Williams* (1) out of the estate.

W. Pearson, in reply :—

The question as to the costs really turns upon sects. 53 (2) and sect. 21, sub-sect. 10 (3), of the *Settled Land Act*, 1882, which, as to the former, places a tenant for life in the position of a trustee ; and as to the latter, provides for the payment of costs incidental to the exercise of any of his powers, including the exercise of his power of sale, and it is submitted that upon those sections alone the Plaintiff is entitled to his costs in the action of *Thomas* v. *Williams : Walters* v *Woodbridge* (4).

Then as to the proceeds of sale of the timber. It should be observed that the question in *Cholmeley* v. *Paxton* (5) was whether the power had been properly exercised. Here it has been. In substance there was a separate sale of the timber—at all events, it was sold for a separate consideration. The question is whether the tenant for life was bound to cut down the trees while he was in possession of the estate, or to sell them standing on the land.

It is submitted that he acted rightly, and that he is entitled to the money.

(1) 24 Ch. D. 558.

(2) Sect. 53: "A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties."

(3) Sect. 21, sub-sect. 10: "In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of this Act."

(4) 7 Ch. D. 504.

(5) 3 Bing. 207.

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This is an application made by the tenant for life of a settled estate which has been sold by him under the powers of the *Settled Land Act*, 1882, for payment, out of capital money arising from the sale, of certain sums which he claims as properly payable to him. The case comes before the Court upon two points: first, whether he is entitled to the proceeds of sale of timber growing upon the estate; and secondly, whether he is entitled to certain costs. The Applicant being tenant for life of the settled estate put it up for sale by auction under conditions which are very much in common form. They provided that the highest bidder should be the purchaser, a reserve price being fixed, and that he should, in addition to his purchase-money, of which he was to make a deposit of £10 per cent., pay for all timber according to a valuation to be made in the manner therein described, and they stated that the vendor would sell and convey the estate as a tenant for life in exercise of the powers given to him by the *Settled Land Acts*, 1882 and 1884, and that on payment of the residue of the purchase-money the purchaser should have a proper assurance executed by the vendor and all other necessary parties. [His Lordship, after reading the conditions of sale and stating the result of the sale, continued:—] The Applicant now makes a claim to be paid sums in respect of the timber. The claim is founded partly on a clause in the will of the testator, which is as follows:—[His Lordship read the clause, and continued]; and it is partly made under the 35th section of the *Settled Land Act*, 1882, which is as follows:—[His Lordship read it, and continued:—] Now the trees were at the time of the sale growing upon the estate—they were attached to the soil, and therefore formed part of the inheritance. The sale was by the tenant for life under statutory powers. The price of the trees was to be ascertained in a particular manner by a valuation; but there were not two sales, one of the estate and the other of the timber. The conditions of sale provided that the person who became the highest bidder should be the purchaser of the estate, and should take the timber upon it, and pay for it at a valuation. The amount of the valuation is really an addition to the price which the purchaser agreed to pay for the estate, and, in my opinion, must be considered

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and treated as capital money payable to the trustees under the 21st section of the *Settled Land Act*, 1882. The tenant for life can only make out a title under sub-sect. 9 of sect. 21, and must establish that this is capital money arising under the Act to be applied "in payment to any person becoming absolutely entitled or empowered to give an absolute discharge." Now was the tenant for life, when the timber was sold, absolutely entitled to it in any way? Could he have said that it was his own? In my opinion he could not. The old law was perfectly clear that growing trees were part of the inheritance. Some cases were referred to in the argument, and I will refer to another, a recent one, which was decided by the Court of Appeal, of *In re Ainslie* (1). In that case, which had reference to larch trees which had been blown down but not severed from the soil, Lord Justice *Cotton* (2), said: "Trees which are severed from the soil are personal estate, and trees which are not severed belong to the inheritance. The life and growth certainly afford no test as to whether a tree is or is not affixed to the soil." Therefore, even if trees are dead, so long as they remain affixed to the soil they form part of the inheritance.

A part of the claim of the tenant for life is founded upon the 35th section of the *Settled Land Act*, 1882. [His Lordship read it, and continued:—] What is the effect of that clause? In my opinion it is that a tenant for life is empowered, under certain circumstances, to sever trees from the soil, but until severance has been effected the trees remain part of the inheritance, and he is not absolutely entitled to them.

At the date of the sale the tenant for life had not exercised his powers under the will "to fell and cut any timber or other trees which may begin to decay, or which may materially injure the underwood." The trees had not been cut or severed; and as regards the 35th section of the Act, he had not obtained the consent of the trustees to the severance of the trees whether ripe and fit for cutting or otherwise. All that he had obtained from them was their consent to a sale of the estate with the timber, and in my opinion, therefore, he was not absolutely entitled but was in the same position as a tenant for life under the old

(1) 30 Ch. D. 485. (2) 30 Ch. D. 488.

law who was impeachable for waste selling under a power. That position is exemplified in the case of *Doran* v. *Wiltshire* (1). In that case there was a tenant for life without impeachment for waste, with power to sell with the consent of the trustees, who were to receive the purchase-money and to invest the same. There was an agreement for the sale of the estate, which included the timber upon it, and the tenant for life claimed to appropriate the proceeds of sale of the timber to his own use, but the Lord Chancellor (Lord *Eldon*) said (2): "He thought, as to the produce of the timber trees, the plaintiff *Doran* could not be entitled to it. There is a great difference between a tenant for life cutting down timber for which he is not impeachable while he actually occupies the land and his executing a power to sell. In the latter case he is not to have the value for himself." Therefore the claim to be paid the two sums of money in respect of timber fails.

The next question is whether the tenant for life is entitled to be paid certain costs which were incurred by him in defending an action which was brought to restrain him in the exercise of his power of sale. The answer to that depends upon three or four clauses of the *Settled Land Act*, 1882. Sect. 53 provides that "a tenant for life shall, in exercising any power under this Act . . . be deemed to be in the position and to have the duties and liabilities of a trustee." It has been contended that by virtue of that section the tenant for life is a trustee, and as such is entitled to all his costs, charges, and expenses, properly incurred. It is not necessary to decide the point here, but as at present advised I do not assent to that contention, as I regard sect. 53 as imposing the responsibilities of a trustee on the tenant for life, rather than as conferring the rights of a trustee upon him. When the Act is looked at as a whole, the scheme of it seems to be not to enact in general terms that a particular person shall be deemed to occupy a particular legal position, leaving the consequences which follow from such enactment to be determined by the general law, but to provide specifically in each case what the rights of particular persons shall be. For instance, the trustees of a settlement are not left to depend on the general law for their right to reim-

(1) 3 Sw. 699. (2) 3 Sw. 701.

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bursement: but by sect. 43 it is expressly provided that the trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them. However, it is not necessary to decide the point.

There are two clauses under which a tenant for life may obtain payment of costs. By sect. 21 the capital money arising under the Act, subject as therein mentioned, "shall when received be invested or otherwise applied" in the modes set forth in the sub-sections, and amongst others (sub-sect. 10) in payment of costs; and by sect. 46, sub-sect. 6, the Court has power to make an order respecting the costs, charges, and expenses of all parties to any application, and may order that all of them be paid out of the settled property. Then sect. 47 provides how costs, charges, and expenses, directed to be paid out of the settled property, are to be raised and paid. With those sections is to be read sect. 55, sub-sect. 3, which states that where any provision in the Act refers . . . to any power, consent, payment . . . or transaction, the same shall be construed to extend only to . . . powers, consents, payments . . . and transactions under the Act.

Now the question in this case seems to me to depend upon the meaning of sect. 21, sub-sect. 10. [His Lordship read it, and continued:—] And it must be observed that what is allowed is the payment of costs, charges, and expenses, not merely "of" but also "incidental to the exercise of any of the powers" of the Act, and I have to determine what force is to be given to the words "incidental to." It seems to me that if any meaning is to be attached to them it is that the tenant for life is to have not merely his costs, charges, and expenses which directly and necessarily arise out of the exercise of the powers and provisions of the Act, but also those which, without being a direct or necessary consequence of that exercise, are incurred casually or incidentally in the course of that exercise. Take this case: a tenant for life being minded to sell his estate under the powers and provisions of the Act, advertises it properly and rightly for sale; thereupon the remainderman brings an action to restrain him from proceeding with the sale, and obtains an injunction. At the trial the action is dismissed with costs, which would, of course, be as between party and party. Would the tenant for life be

entitled to have paid to him out of the capital money the difference between those costs and his costs as between solicitor and client? I think he would be, as those costs may be properly described as "incidental" to the exercise of the power of sale under the Act. The remainderman improperly interposed an obstacle in the way of the exercise of that power, and in the removal of the obstacle certain costs were incurred. Now I see no reason why in fairness the tenant for life should not have those costs. A trustee is entitled in an ordinary case to recover out of the trust estate, as charges and expenses properly incurred, all his costs of an action which he has properly defended; of which the case of *Walters* v. *Woodbridge* (1) is a very strong illustration; and so, where a tenant for life has properly defended an action to restrain him from exercising his powers under the Act the difference between solicitor and client and party and party costs would seem to me to be charges and expenses incidental to the exercise of the power. But the case which I have been putting is not entirely the present case, because the action of *Thomas* v. *Williams* (2), brought against the tenant for life and the trustees, was commenced in 1881, and the *Settled Land Act*, which was passed in 1882, did not come into operation till January, 1883. Though the pleadings in that action are not in evidence, it appears that the case did not come on for trial till March, 1883, after the Act came into operation. After a discussion whether a sale could be properly effected under the will, or whether the tenant for life could exercise his power under the Act, the action was dismissed with costs by Vice-Chancellor *Bacon*. Afterwards an interlocutory injunction restraining a sale either under the power in the will or under that contained in the Act was obtained pending an appeal, but ultimately the appeal was dismissed with costs. I think that in this case the tenant for life is not entitled to be paid all his costs, as that would be going against sect. 55, sub-sect. 3, of the Act, to which I have referred, but he is entitled to some of them. The proper course will be this:—The Taxing Master in taxing the costs will decide how much of the action of *Thomas* v. *Williams* related to the exercise of the power under the *Settled Land Act*, 1882, and

(1) 7 Ch. D. 504. (2) 24 Ch. D. 558.

STIRLING, J. will ascertain the solicitor and client costs of that part of the action. Then he will ascertain what were the party and party costs which have been paid to the tenant for life, and were attributable to the same subject-matter, and then the difference will be allowed to the tenant for life as charges and expenses incidental to the exercise of the power of sale. To that extent I think the tenant for life is right.

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As to the costs of this application, they will be allowed to all the parties.

Solicitors: *James Neal*, agent for *T. L. Jenkins, Newport, Mon.*; *Ridsdale & Son*, agents for *Grover & Grover, Cardiff*; *H. A. Stephens*, agent for *Francis James, Swansea.*

T. F. M.

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[1886 E. 123.]

Trustee—Breach of Trust—Indemnity—Concurrence in Breach of Trust.

A trustee who distributes a trust fund among strangers at the request of one of the beneficiaries, from whom he takes a covenant of indemnity, cannot afterwards recover under the covenant for the loss of a beneficial interest, to which he has subsequently become entitled, in the fund.

The effect of active concurrence by a person in a breach of trust upon a beneficial interest to which he subsequently becomes entitled in the trust fund considered.

A. was sole trustee of a fund held in trust for *B.* for life, then for Mrs. *B.* for life, then if she died in *B.'s* lifetime, in trust as she should appoint by will, and in default for her next of kin. *A.*, at the request of *B.* and wife, raised £5000 out of the fund, paid £1000 to each of the four adult daughters of *C.*, and £1000 to *C.* in trust for his infant daughter. *B.* covenanted with *A.* to indemnify him against "all consequences" of this distribution of the £5000. Mrs. *B.* died in *B.'s* lifetime intestate, and her next of kin were *A.* and *C.* On the death of *B.*, *A.'s* representative sued *B.'s* representative to compel him to replace the £5000:—

Held, by *Kay*, J., that the fund must be replaced.

Held, on appeal, that the object of the covenant was only to indemnify *A.* from demands against him, as trustee, for breach of trust, and that it ought not to be construed as an undertaking to make good to him any loss which he, as a beneficiary, might sustain by the diminution of the trust fund; and that since *A.*, as next of kin, could not have made a claim against himself as trustee in respect of the breach of trust, there was no claim against *A.'s* estate in respect of which his representative could claim indemnity from *B.'s* estate so far as regarded *A.'s* interest as one of the next of kin:

Held, also, that *C.*, having actively concurred in the distribution, could not have made any claim against *A.* or his estate in respect of it, even if he had not known, as the Court was satisfied he did know, that he had a possible interest in the trust fund, and that the distribution of it was a breach of trust:

Held, therefore, that as regarded *C.'s* interest as one of the next of kin, there was no claim against *B.'s* estate under the covenant.

The action was therefore dismissed.

By a settlement of the 2nd of October, 1830, made on the marriage of the Rev. *E. R. Benyon* with *Jane Evans*, trusts were declared of £3001 consols, the property of the wife, and of another sum of stock belonging to the husband, upon trust to

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pay the income to the husband for life, then to the wife for life, and after the decease of the survivor upon trusts for the issue of the marriage, and if there should be no child of the marriage, then, as to the £3001 stock, in the event of the wife dying in the lifetime of the husband, in trust for such persons as the wife should by will appoint, and in default of appointment upon trust for the persons who at her decease would have been entitled thereto as her next of kin according to the *Statutes of Distribution* if she had died possessed thereof intestate and unmarried, and if more than one, in the same shares as under the statutes. The same trusts were by reference declared as to a mortgage debt of £3000, and some other moneys brought into settlement by the wife.

There never was any issue of the marriage. In 1875 *Richard Weaver Evans*, who was a brother of Mrs. *Benyon*, was the sole surviving trustee of the settlement, and the stock in his hands, representing Mrs. *Benyon's* part of the settled funds, was £7860 consols.

On the 23rd of January, 1875, Mrs. *Benyon* wrote as follows to her brother, *Edward Charles Evans*, who had five daughters:—"My good hub desires me to write to you upon a little matter of business—it has come into his head that as I intended the five girls to have £1000 each of my money whenever it pleases God to call me hence, they may just as well enjoy the interest of it now as wait for it a little longer. Will you, therefore, send me the names of them all. He means to have it settled upon each personally, and put into trustees' hands, to ensure them something, though small, should anything untoward arise."

A correspondence then took place between Mr. *Benyon*, his solicitor, and *Richard Weaver Evans*. The solicitor explained that the proposed transaction was not authorized by the trusts of the settlement, but *R. W. Evans* agreed to carry it out on receiving an indemnity. He accordingly sold £5405 of the above stock for £5012 12*s*.

By an indenture dated the 5th of April, 1875, made between Mr. and Mrs. *Benyon* of the first part, Mr. *Benyon* of the second part, Mrs. *Benyon* of the third part, and *R. W. Evans* of the fourth part, which recited that under her marriage settlement, made in

1830, Mrs. *Benyon* had, subject to the trusts declared thereby in favour of herself and her husband, and in favour of the children of the marriage, of which there had never been any issue, a general power of appointment by will over all or some part of the stocks, moneys, funds, and securities thereby settled, and reciting that there were standing in the name of the said *R. W. Evans*, the surviving trustee, £9001 consols and £7860 consols, and reciting that Mrs. *Benyon* was desirous of making a present distribution of part of the said funds as thereafter mentioned, and that *R. W. Evans* had on her request consented to such distribution, on condition that Mr. and Mrs. *Benyon* should enter into the covenant thereafter contained, and reciting that *R. W. Evans* had sold £5405 consols, part of the £7860, for £5012 12*s.* cash, and paid thereout £12 12*s.* for costs and expenses incurred in or about the preparation and execution of the present deed and the distribution thereby authorized, and retained £5000 in hand, It was witnessed that the said *R. W. Evans* should hold the £5000 upon trust to pay thereout the sum of £1000 to each of the five daughters (naming them) of *Edward Charles Evans* for her sole and separate use, provided that if any one or more of them should be under age, the sum held in trust for her should be paid to her father, whose receipt should be a complete discharge to *R. W. Evans*. By the same deed each of them, Mr. and Mrs. *Benyon* ("the said *Jane Benyon* covenanting, for the purpose of binding herself in conscience, and also so far as she can do so of binding her separate estate") thereby separately covenanted with *R. W. Evans*, his executors, administrators and assigns, that they or one of them, or the heirs, executors, or administrators of them, or one of them, would "keep the said *R. W. Evans*, his executors and administrators, estate and effects, effectually indemnified from and against all consequences of the sale of the said £5405 Consolidated Bank Annuities and the distribution of the proceeds, as hereinbefore provided, and in particular from and against any claim which the said *Jane Benyon*, her executors, administrators, or assigns, may hereafter make or be entitled to make in respect of the said sum of consols, or any part thereof."

On the 6th of April Mr. *Benyon* wrote to *Edward Charles*

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Evans: "At last we have succeeded in carrying out our wishes respecting the giving to your daughters £1000 each, and we have signed the indemnity to your brother for his consent as our surviving trustee."

Four of the five daughters were of age, and received the £1000 apiece, and *R. W. Evans*, pursuant to the deed, paid the remaining £1000 to *Charles Edward Evans*, to be held in trust for his fifth daughter, who was then a minor. He signed a receipt: "Received of *R. W. Evans*, Esq., the surviving trustee of the marriage settlement of the Rev. *E. R.* and Mrs. *Benyon*, the sum of £1000, the amount directed to be paid to me on account of my daughter, *Edith Jane Evans*, who is under age, by a certain indenture dated the 5th of April, 1875."

Mrs. *Benyon* died in January, 1876, intestate. Her next of kin according to the statutes were her two brothers, the above-mentioned *R. W. Evans* and *Edward Charles Evans*.

Richard Weaver Evans died in December, 1881, and the Plaintiff was his sole legatee and executor.

Edward Charles Evans died in March, 1881.

Mr. *Benyon* died in 1883, leaving a will made in 1876, by which he devised to *Richard Evans*, son of the above named *Richard Weaver Evans*, certain land in *Herefordshire*. He then referred to *R. W. Evans* having at the request of Mr. and Mrs. *Benyon* distributed in Mrs. *Benyon's* lifetime a large portion of the trust funds in the marriage settlement among Mrs. *Benyon's* five nieces, and gave to *Richard Evans* all the funds comprised in the settlement then remaining undistributed, and directed that these gifts should exonerate his other property from the liability (if any) under the above deed of indemnity. *Richard Benyon* was his legal personal representative.

The Plaintiff, as executor of *R. W. Evans*, commenced this action in 1886 against *Richard Benyon*, as the executor of Mr. *Benyon*, and against the representatives of *Edward Charles Evans*, to have the £5405 consols made good out of the estate of Mr. *Benyon* by virtue of the covenant in the deed of the 5th of April, 1875.

The representatives of *Edward Charles Evans* by their defence submitted that the £5405 consols ought to be replaced.

Benyon, by paragraph 13 of his defence, alleged that *R. W. Evans*

concurred in and was an active party to the sale of the consols and distribution of the proceeds, with full knowledge of the trusts of the settlement and the other facts of the case, and concurred and acquiesced in the distribution of the proceeds among his five nieces, with the intention of relinquishing, and did in fact relinquish, all his own claims to the said consols and the proceeds thereof; that the covenant of indemnity was entered into for the sole purpose of protecting *R. W. Evans* against any claims in respect of the transaction which might be made against him or his estate by Mrs. *Benyon* or any persons interested under her will; that Mrs. *Benyon* having predeceased her husband and died intestate no such claim could be made, and that the covenant of indemnity did not apply to the state of facts under which the Plaintiff claimed the benefit of it.

By paragraph 14 he alleged that *Edward Charles Evans* was a party to and concurred in the sale and distribution with full knowledge of the trusts of the settlement and the other facts of the case, and concurred and acquiesced in the distribution of the proceeds among his five daughters with the intention of relinquishing, and that he did in fact relinquish, all his own claim to the consols, and that his executors were therefore estopped from any claim for the benefit of his estate to have the consols or any part thereof made good out of the estate of *R. W. Evans* or the estate of *Benyon*.

The action was heard before Mr. Justice *Kay* on the 4th and 5th of May, 1887.

Renshaw, Q.C., and *Stallard*, for the Plaintiff, stated the case.

[KAY, J.:—In order to bar your claim to a moiety of the £5000 the representative of *E. R. Benyon* must prove that *R. W. Evans* concurred in the deed of the 5th of April, 1875, with the intention of giving up his own possible claim as beneficiary.]

Marten, Q.C., and *Levett*, for the representatives of *E. C. Evans*.

Ince, Q.C., and *Herbert Lake* for the Defendant *Benyon*:—

The general words in the covenant of indemnity must be read by the light of the special words: *Elphinstone* on the Interpreta-

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tion of Deeds (1); *Hopkinson* v. *Lusk* (2); *Howard* v. *Earl of Shrewsbury* (3). The covenant was only intended to provide for the repayment to *R. W. Evans* of any sum of money which he might be called upon to pay in consequence of the breach of trust, not to provide for the payment to him of money for the payment of which he was not liable, nor to give him an additional advantage of which, by his own act in concurring in the breach of trust, he had voluntarily deprived himself.

E. C. Evans took the advantage of the breach of trust with full knowledge of the circumstances. He therefore acquiesced in it, and could not sue *R. W. Evans* in respect of it, and consequently *R. W. Evans*, not being liable in respect of *E. C. Evans'* moiety in the trust fund, cannot recover anything in respect of such moiety under the covenant of indemnity.

After the death of Mrs. *Benyon* in 1876 *R. W. Evans* and *E. C. Evans* must have known that they were the next of kin entitled under the settlement. Nevertheless they made no claim, and must therefore be taken to have acquiesced in the breach of trust.

[KAY, J. :—Their interest was reversionary, and in *Life Association of Scotland* v. *Siddal* (4) it was decided that a *cestui que trust*, while his interest is reversionary, cannot be held to have sanctioned a breach of trust merely because he does not interfere.]

In any view the limit of the liability under the covenant of indemnity must be the sum of £5012 12*s.*, the amount of the actual proceeds of sale of the consols. Under the settlement, it was competent to Mr. and Mrs. *Benyon* to direct a sale of the consols with a view to reinvestment, and they did so. They might if they had chosen have kept the money in specie until the moment of reinvestment.

KAY, J. (after stating the material effect of the settlement of the 2nd of October, 1830, and the circumstances attending the execution of the deed of the 5th of April, 1875, and reading the first three recitals contained in that deed, continued as follows :—]

The only mention in this deed of *R. W. Evans* in connection

(1) Page 134 *et seq.*
(2) 34 Beav. 215.
(3) Law Rep. 17 Eq. 378, 391.
(4) 3 D. F. & J. 58.

with this matter is that he was the surviving trustee. He was made a party to the deed in that character, and in no other character, and when he consented, as it was stated in the deed he did, it is obvious that he did so in the character in which he was made party to the deed, namely, that of sole trustee, as he then was. [His Lordship proceeded to read the deed down to and including the operative part, and continued:—] Now, what is the common sense meaning of that? The sole trustee of this settlement was asked by the husband and wife to pay money, forming part of the settled funds, to persons who had no more right to it than any other individual in Court at this moment. They had not even a prospective right, they were merely possible next of kin; they had nothing to do with the settlement, and were perfect strangers to it. The transaction was to be at the risk of the husband and wife, and all the three parties to the deed knew perfectly well that the transaction was a breach of trust. The husband and wife in effect said to the trustee, "Will you let us have this money, in order that we may give it to these persons whom we desire to benefit?" That is the common sense view of the matter. The risk of the wife was, of course, nothing. She had no separate estate, nor any property out of which she could indemnify the trustee. The trustee, in reply to the proposal so made to him, in effect said, "Yes, I am trustee; make me safe, and I do not care what you do with the money. I will give you the money to pay to these persons, if you will indemnify me." Accordingly the deed proceeds thus:—[His Lordship read the covenant of indemnity and continued:—] That is as large an indemnity as could possibly be given. The trustee is not to have any liability in respect of the deed, which is not his deed, but that of the husband and wife; he is merely the trustee, who is asked to consent to the gift of the money by them to their nominees. That is exactly the transaction.

Some letters were referred to which shew that it was at that time in the contemplation of the parties that Mrs. *Benyon* should exercise her power of appointing by will. Of course she could not have been compelled not to revoke such a will, if she made it, and she never did in fact appoint by will.

Mrs. *Benyon* died on the 9th of January, 1876, and it so

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happened that *R. W. Evans*, the trustee, and *E. C. Evans*, the father of the young ladies to whom the money was given, were her statutory next of kin at her death. They might then have insisted on the fund being at once replaced, but they were not bound to do so. That was decided in the well-known case of the *Life Association of Scotland* v. *Siddal* (1). It is perfectly well settled that persons entitled in reversion to a fund are not bound to bring their action for replacement of the fund until their interests vest in possession. The fund did not vest in possession on the death of Mrs. *Benyon*, because of the existing life interest of her husband, who survived her, and it was not until his death, in 1883, that the interests of *R. W. Evans* and *E. C. Evans* became vested in possession. The Plaintiff, who is the legal personal representative of the covenantee, *R. W. Evans*, has instituted this action upon the covenant of indemnity.

Now what possible answer is there to the action? It is brought upon the covenant. The money has gone, and the trustee or his representative is entitled to the fullest possible indemnity.

But it is said—and this is the only point in the case which seems to me to deserve notice—that *R. W. Evans* and *E. C. Evans* are in some way prevented from raising this defence, and the pleading is this:—[His Lordship read paragraph 13 of the statement of defence and continued:—] That is a perfectly good plea, if it could be supported, but there has been no attempt to give a tittle of evidence in support of it. It would have to be proved that *R. W. Evans* entered into such an agreement as the following:—"I, being a possible next of kin of *Jane Benyon*, do hereby, for the purpose of carrying out this arrangement, relinquish all interest which I may have as such next of kin." Where is the evidence of any such agreement by him? I do not find a trace of anything like it. It seems to me entirely out of the case. On the face of the deed there is no reference to his being a possible next of kin. That it entered into his mind at all, I have not the least reason for supposing. The burden of proving this is upon those who allege it, and they have not attempted to prove it. I am told, nevertheless, that upon the facts I ought to decide that he gave up his interest as possible next of kin. I do not arrive

(1) 3 D. F. & J. 58.

at any such conclusion. I believe that nothing was further from his mind, and, as far as I can see, there is not a trace of any evidence of such an intention or idea.

As to the other share, the argument addressed to me has been still more remarkable. [His Lordship read paragraph 14 of the statement of defence and continued:—] In order to support that the only evidence brought before me was a letter written by *E. C. Evans* in which he refers to the payment to his daughters; but the letter does not refer to his own interest as possible next of kin. There is no evidence whatever that he ever knew that he was possible next of kin, or that, knowing it, he intended to give up such interest as he might have in that capacity. The truth is that his daughters took the money as the gift of Mrs. *Benyon* and her husband. The transaction seems to me to be for this purpose, precisely the same as if *R. W. Evans*, the trustee, had, at the request and on the indemnity of the husband and wife, handed the money over to them to do what they liked with it; because all that he did was on their request to pay it to persons nominated by them. He had no interest in the matter, and accordingly, for the purposes of this deed of indemnity, it is precisely the same thing as if he had paid the money to the husband himself. Therefore these two defences are not supported in any way.

Then another point was made, which I confess I am not able to appreciate. The property of *E. C. Evans* has now devolved upon these young ladies, his daughters, and amongst that property is his interest as next of kin in one moiety of this fund. Because they have derived that from their father, it is said that they must bring it into hotchpot, or in some way account for it. All I can say is that I do not comprehend that contention. Because the husband, *E. R. Benyon*, gave these young ladies £5000, which he got the trustee to give him out of the trust money, and because they derive from their own father ultimately an interest in that trust money—why, for those reasons, they are to bring anything into account I cannot imagine. Suppose they derived it through fifty people, it would have been just the same. What difference could it make? They took nothing under the settlement, any more than any person here present. What they took was by the gift of the husband. The trustee, at the request

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of the husband, hands, out of the trust fund of the wife, a sum of money to the husband, and lets him do what he likes with it, and that upon his giving to the trustee an indemnity. How can the husband, when it turns out that he was not himself entitled to the money, and that his nominees to whom he gave it were not entitled to the money or any part of it under the settlement, resist the action of the trustee to make him pay the money back? The trustee in effect says: "The persons who have become entitled to the money, in the events which have happened, are not you, the husband, nor you, the wife: but other persons, who, so far as this transaction is concerned, are entire strangers: the fact that I happen to be one of such persons is nothing to you. I never gave up my interest, nor did the other next of kin. The truth is that at the time I had no interest whatever, not even an inchoate interest; there was merely the possibility of a succession; I never intended to deal with it, and there is no trace of any such intention." Accordingly the claim of the next of kin to have this money paid to them under the settlement seems to me to be unanswerable. If they can claim payment under the settlement, then the right of the trustee to indemnity is equally unanswerable. I hold that in this case the fullest possible indemnity must be given to the trustee. The whole amount of the trust fund, that is, the present value of the consols with an amount equivalent to the dividends accrued since the death of Mr. *Benyon*, the tenant for life, must be paid out of his estate.

C. C. M. D.

C. A. *Benyon* appealed, and the appeal was heard on the 17th and 18th of November, 1887.

Rigby, Q.C., and *Herbert Lake*, for the Appellant:—

As regards the liability in respect of the moiety which the Plaintiff claims, we say that the covenant was a covenant of indemnity only. There is no reference to the beneficial interest to which *Richard Weaver Evans* might become entitled, and the true construction is that the covenant was to indemnify him against claims by other persons, not against loss which he himself

would sustain in the event of his becoming entitled to a beneficial interest. He was to be indemnified as a trustee, but as beneficiary he could not claim against himself as trustee, he therefore could not have had recourse to the covenant of indemnity, neither can his representative.

As regards the claim of the representative of *Edward Charles Evans*, he actively concurred in the payment of the money to his daughters. It is to be inferred from the documents at the time that he knew that the money paid to his daughters was settled money, and that what was being done was a breach of trust, but we ask leave to adduce further evidence to shew that he knew of his beneficial interest at the time. This evidence has been volunteered since the trial by the Plaintiff's wife, the last person to whom we could have thought of applying for it.

[THEIR LORDSHIPS thought that under the circumstances of the case this evidence ought to be admitted. The Plaintiff's wife was accordingly examined and cross-examined *vivâ voce*. The material fact stated by her was that in a conversation with *Edward C. Evans* in January, 1879, she had spoken to him of Mr. *Benyon's* kindness to the daughters of *Edward C. Evans* in making the above gift to them, to which he replied: "Kind? my dear *Julia*, what do you mean? He could not have given it to them without my consent."]

Edward Charles Evans having actively concurred in the breach of trust with this knowledge of the facts, could never have made any claim against the trustee, so there is no remedy under the covenant of indemnity as regards his moiety. At all events, *Edward's* daughters who take under his will cannot have over again what they have already received: *Nail* v. *Punter* (1); *Cooper* v. *Cooper* (2).

Renshaw, Q.C., and *Stallard*, for the Plaintiff:—

We do not say that *R. W. Evans* as beneficiary could have made a claim against himself as trustee in respect of this breach of trust, and his representative therefore would have had no claim against Mr. *Benyon* under a simple covenant of indemnity; but

(1) 5 Sim. 555. (2) Law Rep. 7 H. L. 53.

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we say that this is not an ordinary covenant of indemnity, it is a covenant to indemnify *R. W. Evans* against "all consequences" of the breach of trust, *i.e.*, against all loss of whatever kind which it might occasion to *R. W. Evans*. There is no trace in the deed of his having a beneficial interest. The trust in default of appointment is not recited. The settlement appears to be missing, and in all probability *R. W. Evans* did not know that he had a beneficial interest. At all events he concurred in the deed only as a trustee and not in respect of his possible beneficial interest, and there is nothing to shew that he intended to affect it.

Marten, Q.C., and *Levett*, for the representatives of *Edward Charles Evans*:—

There is not enough to shew that *E. C. Evans* understood his interest and intended to bind it. His actively concurring in an improper dealing with the fund cannot bind his interest unless he knew of it. The evidence of the Plaintiff's wife as to what *E. C. Evans* said in a familiar conversation some years ago cannot be relied on as accurate. It is not to be assumed that a layman would know that a breach of trust was being committed, because an indemnity was referred to. There is nothing then to bar our remedy against the trustee's estate, and the covenant of indemnity comes into operation.

COTTON, L.J.:—

This is an appeal from a judgment of Mr. Justice *Kay*, and the action is a somewhat extraordinary one. The Plaintiff is the representative of *Richard Weaver Evans*, the surviving trustee of a settlement made in 1830 on the marriage of Mr. and Mrs. *Benyon*, and the first defendant is the personal representative of the deceased husband. The wife's property included in the settlement was settled so as to give a life estate to the husband, a life estate to the wife, and then the settled fund went to the children. If there were no children and she died in the lifetime of her husband, then she had power to appoint by will, and if she made no appointment then the property went to those who at her death should be the next of kin entitled under the *Statutes of*

Distribution. A brother of the lady had five daughters. She and her husband in the year 1875, there being no issue of the marriage, were desirous of making some provision for these nieces, and thought that it would be desirable at once to give during the lifetime of the husband and wife £1000 to each of them. One niece was under age, and her £1000 was to be given to her father for her. This plan was carried into effect. Of course they had no power then effectually to dispose of this £5000 part of the trust fund. Mrs. *Benyon* could give it by will, but that will of course would not be operative during her lifetime, and she might at any time have revoked it. Therefore *Richard Weaver Evans*, who was then the surviving trustee, naturally would require a deed of indemnity if he concurred in handing over the £5000 to the nieces. The deed of indemnity was executed, and £1000 was paid to each of the adult nieces, and £1000 was handed to their father, *Edward Charles Evans*, on behalf of his infant daughter.

Unfortunately Mrs. *Benyon* never made a will, as in prudence she ought to have done, appointing £1000 to each of her nieces. If she had done so the questions now before us never could have arisen. She died in the lifetime of her husband, and the persons who were entitled as her statutory next of kin were her two brothers, *Richard Weaver Evans*, the trustee who had handed over this £5000, and *Edward*, for whose children it had been paid, and who had been a consenting party to the distribution and active in this sense, that he had known that it was given to his daughters, and had received £1000 on behalf of and held it for that daughter who was under age. Then this action is brought by the personal representative of *Richard Weaver Evans*, the surviving trustee, as against Mr. *Benyon*, the husband's personal representative, to oblige him to make good out of the estate of the husband the amount which the trustee had paid away, and Mr. Justice *Kay* thought that the Plaintiff was entitled to have it done under the provisions of the indemnity deed.

Two cases have to be dealt with. The first is the case of the Plaintiff on his own behalf. He is the personal representative of one of the next of kin, and as such is entitled to a moiety of the funds subject to the trusts of the settlement. Then there is a claim in respect of the other moiety by the personal representa-

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tives of *Edward*, who claim to have from the trustee the £2500, and if they can make that claim effectually the trustee will be entitled to be indemnified under the deed as against the personal representative of Mr. *Benyon*. Before I go further I will say that of course the Plaintiff, as personal representative of *Richard Weaver Evans*, and the personal representatives of *Edward*, cannot stand in any better position than that in which *Richard* and *Edward* would have stood if they had survived the husband and had then made their claims. The claim of the personal representatives of *Edward*, it might be said, would stand in a worse position than a claim by *Edward* himself if living, but in the view which I take of this transaction it is not necessary to go into that.

On behalf of the Plaintiff it was not contended that he as repre senting *Richard Weaver Evans* could have made any claim against his testator's estate for a breach of trust as regards the distribution of this fund. Of course it would be idle to contend that *Richard Weaver Evans* could, if he had survived the husband and wife, have made individually in respect of his title as next of kin any claim against himself as trustee for committing a breach of trust, and Mr. *Renshaw* very prudently did not contend that he could. But then it was said that the covenant contained in the deed of indemnity gave him a right to be recouped £2500 by the estate of the husband. Now is that the true meaning of this deed? Mr. *Renshaw* pressed upon us, and in that I think he was right, that *Richard Evans* was made a party to this deed simply as a trustee, and not in respect of any beneficial interest he had. I agree. But what *primâ facie* is the meaning and object of an indemnity deed given to a trustee? It is to protect him from any claim made against him as trustee in consequence of his having committed a breach of trust. Is there anything in this deed which gives a greater effect to the covenant on which the Plaintiff relies? The covenant is in these terms: "Each of them the said *Edward Richard Benyon* and *Jane Benyon* (the said *Jane Benyon* covenanting for the purpose of binding herself in conscience, and also, so far as she can do so, of binding her separate estate) doth hereby separately covenant with the said *Richard Weaver Evans*, his executors, administrators, and assigns, that

they or one of them, or the heirs, executors, or administrators of them or one of them, will keep the said *Richard Weaver Evans*, his executors and administrators, estate and effects, effectually indemnified from and against all consequences of the sale of the said £5405 Consolidated Bank Annuities and the distribution of the proceeds as hereinbefore provided, and in particular from and against any claim which the said *Jane Benyon*, her executors, administrators, or assigns, may hereafter make or be entitled to make in respect of the said sum of consols or any part thereof."

Now to my mind those words only carry out what *primâ facie* is the object of every indemnity deed. Mrs. *Benyon* might have apportioned this fund by her will to some persons other than her nieces, and then those persons would have been entitled to say to her trustee, "Under this appointment we are entitled to claim everything which ought now to be in your hands as trustee." The deed provides an indemnity against that. The words that he shall be effectually indemnified from and against "all consequences of the sale of the £5405 Consolidated Bank Annuities and the distribution of the proceeds as hereinbefore provided" are relied upon, and it is said, "*Richard Weaver Evans*, having become in the events which have happened entitled to a moiety of everything which ought to be subject to the trusts of the settlement, is damnified by the settled funds being diminished by the sale of the £5405 and the distribution of the proceeds, and he is entitled to be indemnified against that loss." To decide according to that view would, in my opinion, be quite contrary to the tenor and object of the deed, and therefore, although the words by themselves might possibly bear that construction, I think that we ought not to so construe them. As *Richard* the individual could not have made any claim against *Richard* the trustee in respect of this distribution, there can be no claim on behalf of the Plaintiff in respect of the £2500 which, if this fund had not been taken from the settlement, he would have had in addition to what he will now have out of the funds which still remain in the hands of the trustee.

The case of *Edward* is a different case. As I said before, the question is, has *Edward* or his representative any claim against *Richard* the trustee or *Richard's* estate for what was done. Now

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we find that naturally Mr. and Mrs. *Benyon* communicated to the father their intention to give the £5000 to his daughters, and, as I have said, he was a party to the ultimate distribution of it. There is in a letter of the 6th of April, 1875, from Mr. *Benyon* to *Edward*, a reference to the deed of indemnity which was given by the husband and wife to *Richard Weaver Evans* the sole trustee, and if it were necessary to decide the point I should hold that *Edward* not only knew, as he necessarily knew, that this was part of the trust fund, but also knew that the gift was made without authority under the trusts of the settlement, because I cannot presume Mr. *Edward Charles Evans* to have been so ignorant as not to know that a deed of indemnity was to provide against some possible consequences to the trustee from claims in respect to the division of the money. I think, however, that independently of that *Edward* could never have made any claim. He, as I said, was consenting to and actively concurring in the distribution of the £5000 among his own daughters, and he received one-fifth of it to hold for one of them. Now, in my opinion, if a person, knowing that a trustee is distributing a settled fund, consents to and is active in the distribution of that fund, he cannot afterwards, if he finds that he is interested under the trusts of the settlement, turn round against the trustee and say, "I am entitled to a share of all which ought to be held by you on the trusts of the settlement; that sum in the division of which I concurred ought to be still held by you; therefore I call upon you to make it good." A Court of Equity ought not to sanction any such claim, even although the claimant did not at the time of the distribution know that he was interested, and although he did not at the time know that the division was a breach of trust. But after the further evidence which we have heard, and even without that further evidence, I should hold that *Edward Evans* did know what his possible interest was, and that with that knowledge he must be taken to have assented to the division so that it should defeat any claim that he might have against the trustee when that possible interest became a real interest. The ground on which I put the case as regards *Edward* is this, that he actively concurred in the division of part of the trust fund, and that when he finds out that that was a breach of trust by the trustee and

that he is entitled, he cannot make against the trustee a claim to replace that fund in the division of which he himself acted.

In my opinion therefore the decision of Mr. Justice *Kay* must be reversed, and the action must be dismissed with costs as against the husband's representative; but without costs as against the representatives of *Edward Charles Evans*. The Appellant, however, must pay the costs of the motion to be allowed to adduce further evidence, which we allowed in this case, considering it a very special case, and not in any way departing from our rule, to which I adhere very strongly, that parties ought not to be allowed to bolster up their case by adducing fresh evidence before the Court of Appeal.

SIR JAMES HANNEN:—

After the very full and clear statement of the reasons which have moved my brother, Lord Justice *Cotton*, I have only to say that I entirely concur.

LOPES, L.J.:—

I entirely agree in everything that has been said, and I have nothing to add.

Solicitors for Plaintiff: *Twisden & Co.*, agents for *Sale, Leominster.*

Solicitors for *Benyon: Lake, Beaumont, & Lake.*

Solicitors for Representatives of *Edward C. Evans: Burton, Yeates, Hart, & Burton*, agents for *Jackson, Ulverston.*

H. C. J.

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1887
Nov. 29;
Dec. 2.

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[1882 N. 565.]

Transfer of Shares or Stock in Railway Company—Delivery of Transfer Deed to Secretary—Companies Clauses Consolidation Act, 1845, *ss.* 14, 15, 16 [*Revised Ed. Statutes, vol. ix., p.* 567].

Under the provisions of the *Companies Clauses Consolidation Act*, 1845, a deed of transfer of shares or stock does not pass the legal interest to the transferee until it has been delivered to the secretary of the company. If he returns it because it does not comply with the requisitions of the Act it is to be considered as not delivered to him.

Trustees who held railway stock in trust for *H. B.* absolutely, executed a deed of transfer to him, and delivered it to the secretary of the company, who returned it because it was not properly stamped and dated. After this *H. B.* made a voluntary settlement purporting to include this stock. Several years afterwards the defects in the deed of transfer were supplied, and it was delivered to the secretary, who received it and registered the stock in *H. B.*'s name :—

Held, that at the time of the execution of the voluntary settlement the stock was not legally vested in *H. B.*, but that he was only equitable owner. That the voluntary settlement of it therefore was effectual, and that *H. B.*'s representative was bound to transfer the stock to the trustees of the voluntary settlement.

Order of *Stirling*, J., affirmed.

By a settlement dated the 11th of September, 1860, made on the marriage of *Howel Morgan* with *Ann Jones*, a sum of £6505 ordinary stock of the *London and North Western Railway Company* and other stocks, funds and securities were settled upon such trusts as the wife should by deed or will appoint, and in default of appointment upon the trusts therein mentioned. The trust premises were duly transferred into the joint names of *Richards* and *Griffith*, the trustees of the settlement. By indenture, dated the 11th of July, 1868, Mrs. *Morgan*, under the above power, appointed all the stocks, funds, and securities comprised in the settlement to *Howel Morgan* absolutely. On the 22nd of July, 1868, a deed of transfer by *Richards* and *Griffith* to *Howel Morgan* of the £6505 stock was duly executed by all parties, and was sent by *Griffith* to the railway company for registration in

the early part of August. It was not sufficiently stamped nor properly dated, the year being omitted from the date, nor were the stock certificates sent with it, nor the registration fee paid. In consequence of these omissions the company refused to register the transfer, and on the 7th of August, 1868, returned the deed of transfer to *Griffith*, who on the 11th had it properly stamped—but nothing more was done in the matter for several years.

By a deed dated the 30th of November, 1869, *Howel Morgan*, in consideration of his natural love and affection for his wife, assigned to *Nanney* and the above-named *Griffith*, *inter alia*, the £6505 railway stock, to be held on the trusts therein mentioned for the benefit of himself and his wife and her appointees or next of kin.

On the 29th of February, 1872, *Griffith* attended at the office of the railway company and left the transfer deed of 1868 duly stamped, and dated the 22nd of July, 1868, but without the stock certificate. The company required an explanation from *Griffith* of the interval between the date of the deed of transfer and the time of lodging it, and *Griffith* on the same day wrote a letter addressed to the company, stating that the circumstances remained the same as when the deed was executed. The company thereupon registered the stock in the name of *Howel Morgan*, but as the old certificates had not been given up nor any statutory declaration of their loss made, no certificate was sent to him. The dividend warrants till the 29th of February, 1872, were made out in the names of *Richards* and *Griffith*, and after that date in the name of *Howel Morgan* until his death.

In 1881 Mrs. *Morgan* died, and in 1882 *Nanney* commenced this action against *Morgan* and *Griffith* to have the trusts of the indentures of the 11th of September, 1860, and the 30th of November, 1869, carried into execution.

By the judgment dated the 12th of March, 1884, it was declared that such of the shares, moneys, stocks, funds, and securities specified in the schedule to the indenture of the 30th of November, 1869, as at the date thereof not only belonged to the Defendant *Howel Morgan* in equity, but were legally vested in him, did not pass by the assignment in such indenture contained to the

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Plaintiff and *Griffith*, but that such of them as were not then legally vested in *Howel Morgan*, although belonging to him in equity, did pass by that assignment, and an inquiry was directed of what particulars such last-mentioned stocks, funds, shares, and securities consisted.

The Chief Clerk by his certificate found that the moneys, stocks, funds, shares, and securities which were not at the date of the indenture of the 30th of November, 1869, legally vested in *Howel Morgan* consisted of the particulars therein-mentioned, including the £6505 railway stock if the Court should be of opinion that under the circumstances thereinafter stated the same was not so legally vested. He then stated the above circumstances as to the transfer.

Mr. Justice *Stirling* on these materials held that at the date of the voluntary assignment the £6505 stock was not legally vested in *Howel Morgan*, and therefore according to the judgment of the 12th of March, 1884, passed by the assignment (1).

John Morgan, the legal personal representative of *Howel Morgan*, appealed from this decision, and the appeal was heard on the 29th of November and the 2nd of December, 1887.

Sir *Horace Davey*, Q.C., and *Upjohn*, for the appeal:—

We contend that the stock was legally vested in *Howel Morgan* at the date of the voluntary settlement. The question turns on the *Companies Clauses Consolidation Act*, 1845, sects. 14, 15, 16. We contend that the property passes as soon as the deed of transfer is executed: *Dodds* v. *Hills* (2). The enactments as to delivery of the deed to the secretary, registration and the giving up of the certificates, are only directory, they apply as between the company and the parties—the transferee is not recognised by the company till they have been done, but as between the transferor and transferee the transaction is complete from the execution of the deed.

Under the *Companies Clauses Act*, 1845, sect. 14, a shareholder is entitled to transfer by deed subject to the regulations in the Act or in the special Act. The only regulation in the general Act here intended to be referred to is sect. 16. Sect. 15 provides

(1) 35 Ch. D. 598. (2) 2 H. & M. 424.

that the transferee is not to have the benefit of the legal title till certain things are done, and so in sect. 18; but those sections evidently by their language assume that the interest has passed at once, but prevent the transferee from receiving the benefit of it till certain formalities necessary for the protection of the company have been complied with. This view of the sections appears to have been taken by the Court in *Reg.* v. *Wing* (1), which shews the difference between sect. 16 and sects. 15 and 18; the effect of sect. 16 being to prevent the interest from passing when a call made on a share has not been paid. If the directions of sect. 15 were conditions precedent to the passing of the interest, we should expect the entry on the register to be the event on which the title passes. In *Dodds* v. *Hills* (2) it was held that a mortgagee who did not register his transfer until after notice of a trust had priority over the *cestui que trust.* The interest, therefore, must have passed before, though the formalities of sect. 15 had not been complied with. In *London and Brighton Railway Company* v. *Fairclough* (3) it was held that the deed had an operation at common law independently of the Act, so that the title passed at once. Notice to the company is required for the same purpose as notice to a debtor of an assignment of a debt, but as between the parties the transaction is complete at once: *Donaldson* v. *Donaldson* (4). *Copeland* v. *North Eastern Railway Company* (5) was relied on by Mr. Justice *Stirling,* but the remarks of the Lord Chancellor must be read with reference to the point before the Court. The question was whether the devolution was a transmission under sect. 18 or a transfer, in which latter case the deed must be left with the company. We do not dispute that in the present case it was necessary that the deed should be left with the company before the transfer could be formally completed; we only contend that the leaving it was not a condition precedent to the title passing. In *Société Générale de Paris* v. *Walker* (6), also referred to by Mr. Justice *Stirling,* Earl *Selborne* deals with legal rights under a set of provisions materially different from those of the *Companies Clauses Act.* The case of *Colonial Bank* v.

(1) 17 Q. B. 645.
(2) 2 H. & M. 424.
(3) 2 Man. & G. 674, 705.
(4) Kay, 711.
(5) 6 E. & B. 277.
(6) 11 App. Cas. 20.

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Whinney (1) is beside the mark, for it related solely to the question whether shares were in the order or disposition of a bankrupt.

Hastings, Q.C., and *Eyre*, for the Appointees:—

The question is whether the stock was legally vested in *Howel Morgan* at the date of the voluntary deed. At that time it was standing in the names of the original trustees, a deed transferring it to *Howel Morgan* having been so irregular that the company would not receive it. The proper way of setting the matter right would have been to execute a fresh transfer to the trustees of the voluntary deed, instead of this the company were afterwards induced by a misrepresentation to receive the original transfer.

[COTTON, L.J.:—After the transferors had executed and parted with the deed of transfer could they execute a further transfer which would have any effect?]

It is submitted that they might, and here moreover the deed had never been parted with to the transferee. The legal owner is the person on the register: *Milroy* v. *Lord* (2), and the language of Earl *Selborne* and Lord *Blackburn* in *Société Générale de Paris* v. *Walker* (3) cannot be got over so summarily as the Appellant attempts to do. In *Reg.* v. *General Cemetery Company* (4) the case of *Copeland* v. *North Eastern Railway Company* (5) is referred to as authority. As to the 14th and 15th sections of the Act we do not say that the deed passes nothing, but that till all the formalities have been complied with the stock is not legally vested in the transferee. If a deed such as the company could not properly refuse to register had been left with them before the date of the voluntary settlement the question would have been quite different. In *Reg.* v. *Wing* (6) remarks by *Coleridge*, J., are relied on, but *Patteson*, J., who speaks more distinctly, is in our favour, for he says that the Act only recognises such a transfer as is provided by the Act, viz., by deed duly registered. *London and Brighton Railway Company* v. *Fairclough* (7) makes the possession of the transfer deed by the company the test.

(1) 11 App. Cas. 426.
(2) 4 D. F. & J. 264.
(3) 11 App. Cas. 20, 28, 36.
(4) 6 E. & B. 415.
(5) 6 E. & B. 277.
(6) 17 Q. B. 645.
(7) 2 Man. & G. 674.

[COTTON, L.J.:—The Act there was not precisely the same.]

The observations of Mr. Justice *Lindley* in *Portal* v. *Emmens* (1) are in our favour. *Copeland* v. *North Eastern Railway Company* (2) may be considered common ground, but the expressions of Lord *Campbell* are in our favour. It has been suggested that the decree is wrong in going on to direct *Howel Morgan's* executors to transfer the stock on the ground that this is completing an incomplete voluntary transfer; but that is disposed of by *Ellison* v. *Ellison* (3); *Kekewich* v. *Manning* (4). The equitable interest having been effectually passed, the person in whom the legal estate is must transfer it. This is stock not shares, and by sects. 62–64 of the Act the persons on the register are the holders of the stock.

Upjohn, in reply:—

Sect. 62 provides that stock shall be transferred in the same way as shares, so no distinction of that kind can be drawn. A person may be a shareholder though he is not on the register: *Wolverhampton New Waterworks Company* v. *Hawksford* (5). There is no provision in the Act which makes delivery of a transfer deed to the company a condition precedent to the property passing.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Stirling*, and there is no authority which much helps us to arrive at a conclusion. *Howel Morgan* executed a voluntary settlement which purported to comprise certain stocks and shares, including £6505 stock in the *London and North Western Railway*. That stock was in the names of the trustees of his marriage settlement, and under his marriage settlement his wife had a power of appointment under which she appointed to him absolutely all the settled funds. That gave him an equitable right to this stock. Previous to the execution of the voluntary settlement he had got from the trustees of the marriage settlement the execution of a voluntary transfer.

(1) 1 C. P. D. 201.
(2) 6 E. & B. 277.
(3) 6 Ves. 656, 662.
(4) 1 D. M. & G. 176, 190.
(5) 7 C. B. (N.S.) 795.

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That unless it was effectual to pass to him the legal estate would not give him any interest at all, because there was no contract for value, but he had an equitable title to the stock under the appointment, which gave him a right to say to the trustees of the marriage settlement—you are trustees of that stock for me. The question is whether as regards that stock the voluntary settlement was effectual. The law as regards voluntary settlement is this. If the settlor transfers all the interest that he is in a position to transfer at that time, then it is effectual. If he does not, then the Court will not assist volunteers as against the settlor, and the settlement is ineffectual as regards that which he might have effectually transferred and which he did not transfer as effectually as he could.

When this case came on at the original hearing, a reference was directed to ascertain what stocks and shares were legally vested in *Howel Morgan*, and it was declared that such as were legally vested in him did not pass by the assignment in the voluntary settlement, but that such as were not legally vested in him, though belonging to him in equity, did pass. I do not think that language very appropriate, for the terms "legal estate" and "legal interest" are terms properly applicable to land. Now what is a share in a company? It is a right to call upon the company for a share of the profits, and to attend and vote at the general meetings. Those are rights which are valuable, and therefore the share is saleable in the market. Then the *Companies Clauses Consolidation Act* gives a power of transferring it, and the question is what, under the circumstances of this case, was the effect of the deed of transfer which was executed by the trustees previous to the voluntary settlement? It was taken to the company in 1868, before the date of the voluntary settlement, but as it was not duly stamped and was not properly dated the company would not receive it, and it remained in the possession of the transferor. Some years afterwards, in 1872, it was taken to the company, and then the formalities were complied with. It was duly stamped and duly dated, and was received by the secretary of the company, and the stock was registered in the name of *Howel Morgan*.

The question turns upon sects. 14, 15, and 16 of the *Companies*

Clauses Consolidation Act (8 Vict. c. 16). I may say that I do not consider that there is any such distinction as was pressed upon us by Mr. *Eyre* between stocks and shares.

Sect. 14, which was very much relied on by Mr. *Upjohn*, is in these terms, "subject to the regulations herein or in the special Act contained, every shareholder may sell and transfer all or any of his shares in the undertaking, or all or any part of his interest in the capital stock of the company, in case such shares shall, under the provision hereinafter contained, be consolidated into capital stock; and every such transfer shall be by deed duly stamped, in which the consideration shall be truly stated; and such deed may be according to the form in the Schedule B. to this Act annexed, or to the like effect." Then there is a particular provision in sect. 16 that no shareholder shall transfer as long as the calls are in arrear, and Mr. *Upjohn* says that is the only thing referred to by the words of sect. 14, "subject to the regulations herein or in the special Act contained," the special Act here being out of the question as it contains nothing about transfer of shares. But is that right? If the effect of a transfer of shares is to give to the transferee the rights against the company which the transferor had, the deed alone clearly does not transfer them effectually, for sect. 15 says, "The said deed of transfer (when duly executed) shall be delivered to the secretary, and be kept by him; and the secretary shall enter a memorial thereof in a book to be called 'the Registers of Transfers,' and shall endorse such entry on the deed of transfer, and shall, on demand, deliver a new certificate to the purchaser." So something more than the execution of the deed is required, and then at the end of the section we find these words, "And until such transfer has been so delivered to the secretary as aforesaid the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking, or to vote in respect of such share." That as regards the company provides that the deed shall not have any effect, so as to put the transferee into the position of the transferor, until it has been left with the secretary, and it must be not only left, but accepted by him as properly left, because if the secretary finds that it does not

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comply with the provisions of the Act it is his duty to refuse to receive it. In my opinion here the deed of transfer had no effect until it was duly stamped and was received by the secretary so as to make the transfer effectual as between the company and the transferee. Therefore as between the company and every one else it is clear that under the Act what may be called the legal right to this stock at the time of the execution of the voluntary settlement still remained in the transferors as trustees of the marriage settlement. We must then remember the 20th section, which says that the company shall not be bound in any way to have regard to trusts, but shall only have regard to the legal title shewn by their register and by the transfers which they have received. I do not place any reliance on the transferee being entered on the register, because when a deed of transfer duly executed is left with the secretary, it becomes the duty of the company to register the transferee as entitled to the shares, and the mere neglect of the company to do that, will not in my opinion affect the right of the transferee to be treated as the legal owner of the shares.

Then it was asked, where at the time of the voluntary settlement was the legal estate? If "the legal estate" means the right to call upon the company to recognise the title of some person as holder of the shares, it clearly remained in the transferors, in the trustees of the marriage settlement. There is, indeed, a difficulty which I put to Mr. *Graham Hastings* during the argument,—Could these trustees who are on the register have executed a subsequent transfer to another person? If their original deed of transfer was for value, they would not be at liberty to transfer to any one else, and the original transferee could interfere to restrain them from so doing. But if he did not interfere, the transferors, in my opinion, could substitute another person instead of the person they had originally proposed to substitute as the shareholder to be recognised by the company as intended to have, and as having, all the rights against the company which the latter part of the 15th section says shall not be transferred from those on the register to any one else until certain things are done. In my opinion, therefore, the answer of Mr. Justice *Stirling* to this inquiry was right, and we must

say that these shares were not legally vested in the voluntary settlor at the time when he executed the voluntary settlement.

Then comes another question which does not seem to have been argued at all in the Court below,—Was the learned Judge right in ordering the personal representatives of the voluntary settlor to transfer these shares to the trustees of the voluntary settlement? That I think depends upon the questions which I have already been discussing. If the legal title was acquired by *Howel Morgan* subsequently to the execution of the voluntary settlement, which settlement was effectual if he had only an equitable title when he executed it, the order was right, because it is perfectly clear that he could not keep to himself the legal interest in shares the equitable interest in which had been effectually settled, and so defeat that voluntary settlement. On the facts which we have here, I come to the conclusion that he by a subsequent act, not his own, acquired the legal estate or legal interest in these shares. The deed of transfer was never delivered to him, and subsequently to the execution of the voluntary settlement one of the trustees of the marriage settlement took the transfer deed to the secretary of the company and presented it duly executed, duly dated, and duly stamped, and in consequence of that act, the deed of transfer, which had been imperfect and ineffectual to pass the legal interest, became effectual and passed the legal interest to *Howel Morgan*, the voluntary settlor, and then he so acquiring it could not retain it as against those claiming under the trust which had been effectually declared. It therefore was right to order his personal representative, who stands in exactly the same position as himself, to transfer that legal interest which he took subject to a trust, to the duly constituted trustees of the voluntary settlement. In my opinion, therefore, the appeal fails.

SIR JAMES HANNEN:—

I have nothing to add.

LOPES, L.J.:—

I am entirely of the same opinion, and I should not desire to add anything, were it not that certain important questions

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arise with regard to clauses 14, 15, and 16 of the *Companies Clauses Consolidation Act*, 1845.

In this case a deed of transfer of the stock in question to *Howel Morgan* was executed, but *Howel Morgan* never had that deed of transfer nor the stock-certificates in his possession. At the time of the execution of the voluntary settlement the deed of transfer had not been duly delivered to the secretary of the company, but remained in the possession of the transferors, and had not been registered. In expressing what I desire to say, I think I need state no more facts than those which I have just mentioned.

Now in those circumstances what was the position of *Howel Morgan?* I think that in the circumstances nothing passed to him by the deed of transfer.

The words at the end of sect. 15 are these: "And until such transfer has been so delivered to the secretary as aforesaid the vendor of the share shall continue liable to the company for any calls that may be made upon such share, and the purchaser of the share shall not be entitled to receive any share of the profits of the undertaking, or to vote in respect of such share." Therefore the transferor, until the delivery of the deed of transfer to the secretary, is subject to all the liabilities and entitled to all the rights which belong to a shareholder or stockholder, and, in my opinion, until the requisite formalities are complied with, he continues the legal proprietor of the stock or shares subject to that proprietorship being divested, which it may be at any moment, by a compliance with the requisite formalities. One of those formalities, as I have pointed out, is a delivery of the deed of transfer to the secretary of the company. Whether the registration of the transfer as well as delivery to the secretary is a necessary formality, it is not necessary in the present case to express an opinion. The necessary formality of the delivery of the transfer to the secretary in this case was not complied with, and I think at the time of the voluntary settlement nothing had passed to *Howel Morgan* by the deed of transfer, and he therefore was not the legal proprietor of this stock. I may add that the construction which the Court is putting upon these sections of the *Companies Clauses Consolidation Act* is consistent with that put

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upon them by Lord *Campbell* in *Copeland* v. *North Eastern Railway Company* (1), where he says, "We are satisfied that the Legislature intended that every transfer should be by deed to be left with the company, which the new taker was to execute, to testify conclusively his acceptance of the shares and his taking upon himself the liabilities of a shareholder."

I think that the decision of the learned Judge below was right.

Solicitors for Appellant: *Morgan, Son & Upjohn.*
Solicitors for Respondents: *Crouch, Spencer & Edwards.*

H. C. J.

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[1886 U. 156.]

Customs Annuity and Benevolent Fund—Interest of Subscriber—"Nominee"—Nomination of a Person as Trustee—56 Geo. 3, c. lxxiii. s. 9—Domicil—Scotch Law—Right of an Infant at the age of Fourteen to choose his Domicil—Evidence.

On the construction of the Act 56 Geo. 3, c. lxxiii., by which the *Customs Annuity and Benevolent Fund* was established, and of the rules made under the authority of that Act:—

Held, that in appointing a "nominee" of a subscriber's interest in the fund the directors ought to be informed for what purpose the nominee is appointed and to whom the money is to be paid. This may be done by the instrument appointing the nominee or by some other instrument signed by the subscriber, or by his will.

Semble, a "nominee" may be a person who is intended to take as a trustee for others.

A subscriber to the fund became lunatic while in *Scotland*, where he died. He made a will before he became insane giving his property to legatees, but making no allusion to his interest in the fund. A curator was appointed by the Scotch Court of Session, and proved the will. The Court of Session made an order appointing the curator nominee of the subscriber's interest in the fund, "for behoof of the legatees under his will," and the directors of the fund admitted him in those terms. The directors admitted that the order had the same effect as if the subscriber, being sane, had made the nomination:—

Held, that the order was a sufficient appointment of the nominee, and a declaration of the persons for whose benefit the sum insured was to be

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(1) 6 E. & B. 284.

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paid; and that the directors were bound to pay the money to the curator.

A testator, being the illegitimate son of a Portuguese woman, was sent to *Scotland* when a child, and lived there till he was eighteen years of age under the control of his reputed father's relations there. He was sent to school in *Scotland* and for a short time in *Germany*. When eighteen, he obtained employment in the English Customs Department and went to *Yarmouth* and thence to *London*, where he remained in the same employment till he was twenty-eight, when he returned to *Scotland* in ill-health, and soon after became a lunatic and died without recovering his reason. While living in *London* he went occasionally to *Scotland*, where he retained apartments, in which he left his books, &c. According to the Scotch law an infant can choose his own domicil at the age of fourteen:—

Held, that whether the law applied to an infant who had a foreign domicil of origin or not, as to which *quære*, the evidence did not shew that the testator had adopted a Scotch domicil.

Semble, so far as the evidence went his domicil appeared to be English.

THIS was an appeal from a judgment of Mr. Justice *North* (1).

The action was brought to enforce payment by the directors of the *Customs Annuity and Benevolent Fund* of the amount of insurance effected by *Lewis Robert Hoyes*, who died on the 26th of March, 1885. The fund was established by the Act 56 Geo. 3, c. lxxiii., and the Plaintiff alleged that he was the "nominee" of *Hoyes*, admitted by the directors pursuant to the Act and to the rules made under it. The Defendant was the secretary to the fund, in whose name, according to the Act, the directors were to sue and be sued.

The Act was entitled "An Act for establishing and regulating a fund for the widows, children, and relatives of officers or persons belonging to the Department of Customs in *England*."

The fund was raised by voluntary subscriptions on the principle of life insurance, which subscriptions, together with the poundage, which was levied on the salaries of all persons engaged in the Customs department, formed a fund for the widows, children, relatives, and nominees of persons employed in the Customs.

Rules were from time to time made, approved, and ratified in the manner provided by the Act.

The material sections of the Act and rules are set out or

(1) 36 Ch. D. 55.

referred to in the previous report of the case: it will be sufficient to state those on which the decision mainly turned.

Sect. 9 of the Act was as follows:—"The said directors shall and may, if they shall deem it expedient, admit any person or persons to be the nominee or nominees of any subscriber to the said fund who may not be a relative or relatives of the said subscriber; and the said nominee or nominees so admitted as aforesaid shall, and are hereby declared to have, and thereafter to continue to have, to all intents and purposes, the same and the like interest in the said fund, and in the advantages thereof, as if the said nominee or nominees had been a relative or relatives of the said subscriber, under and subject in every respect to the rules and regulations approved and ratified as aforesaid."

The first rules were made on the 26th of June, 1819, and were those which were in force when *Hoyes* effected his insurance.

By the 25th rule it was provided that the capital sum insured by any subscriber together with the addition of profit that might from time to time be made thereto should, in its disposal at his death, be available "in such manner or proportions as he may think proper and direct in his will for the benefit of his widow, children, or relatives; and also, under the admissions of the directors, in like manner or proportions, for the benefit of his nominee or nominees who may not be a relative or relatives of such subscriber; and if no annuity to his widow shall be insured, then one-half of any such capital money shall be appropriated to the use of his widow, by allowing her an annuity upon the terms of the table (C); and the other half of such capital money shall be available for the purposes of his will as aforesaid. And in the event of a subscriber dying without leaving a widow, the whole of the capital money shall be so available for the purposes of his will. And in all cases where subscribers die intestate, the capital money which may be available shall be applied to the exclusive use of the child, or in equal proportions to the exclusive use of the children of such subscribers, in the same manner as any other property would be applied by law. And if such deceased subscriber shall leave no child or children, then such available capital money shall be applied in manner set forth by the *Statute of Distributions*."

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On the 23rd of December, 1827, new rules were made, by which the rules of June, 1819, were repealed, and the new rules substituted for them, but it was provided that nothing in the new rules should extend to alter the terms of any insurance already made by any subscriber, so far as related to the terms of his subscription, or to any option allowed him as to the application of the capital sum insured, or of the profits thereon, which might be apportioned to him.

By rule 1 of these new rules it was provided that the admission by the directors of a nominee must be during the lifetime of the subscriber.

Rule 23 provided for the application of the capital sum insured and the profits thereon in similar terms to rule 25 of the rules of June, 1819, except that it was provided that "it shall be available in such manner and proportion as the subscriber may direct by any deed or instrument, or by his will, for the benefit of his widow, children, and relatives, and for such nominees who shall have been duly admitted by the directors."

On the 28th of August, 1836, new rules were again made with a similar proviso that they should not affect the terms of any insurance previously made.

Several notes, not forming part of the rules, were appended to them, and, among others, was the following: "If the subscriber shall apply his insurance by will, it is necessary that he should make specific mention of his insurance in the Customs Fund: otherwise he will be deemed to have died without having given directions as to that insurance, for it will not pass under any general terms. In fact the insurer himself has no actual property whatever in the sum insured, he has only the power to appoint the same for the benefit of the parties described in the rules."

In April and June, 1827, *Lewis Robert Hoyes*, being then in the employment of the English Customs Department, effected two insurances on his life for sums amounting together to £2000.

The following facts were proved by the evidence, and were important in the decision of the question which arose as to the domicil of *L. R. Hoyes*. He was born in *India* in 1806. He was an illegitimate child; his father being a native of *Scotland*, and his mother a Portuguese of *Goa*, in *India*. In 1813 his father

sent him to *Forres*, in *Scotland*, to be educated. He was at school at *Forres* and afterwards at *Banff* in *Scotland*, and spent his holidays with his father's relatives at *Forres*. He was then sent for a few months to a school in *Germany* to complete his education. His father died in or about the year 1818. In 1824 *L. R. Hoyes* entered the service of the English Customs Department at *Yarmouth*, and was thence removed in 1825 to an office in the same department in *London*.

Between that year and 1835 he made two or three visits to *Scotland*, and when there he stayed at the house of his father's niece, Mrs. *Gordon*. One of the witnesses, Mrs. *Smith*, said that "On the occasion of all his visits to *Forres*, after joining the Customs, he occupied the same rooms in Mrs. *Gordon's* house, and kept there his desks, books, games, musical instruments, &c., and these rooms were looked upon as his own, and he paid a rent to Mrs. *Gordon* for them." In 1834 he came to *Scotland* in ill-health, and in 1835 became insane, and was placed in a lunatic asylum at *Aberdeen*, and was shortly afterwards found lunatic, and on the 28th of November, 1835, *John Forsyth* was appointed by the Court of Session his *curator bonis*.

In 1838 *Hoyes* was discharged from the service of the Customs Department in consequence of his unsoundness of mind. He remained a lunatic till his death, and was never married.

The curator found among the papers of the lunatic a will dated the 10th of August, 1833, by which, after bequeathing some legacies, he gave all the residue of his estate and effects "unto my uncle *Lewis Hoyes*, of the Island of *Grenada*, and his heirs," and appointed him and two other persons his executors. The will contained no reference to the testator's insurance in the *Customs Fund*.

The curator then presented a petition to the Court of Session asking the Court to nominate him as "nominee" of the lunatic, for behoof of the legatees under the will, to his interest as a subscriber in the *Customs Fund;* and on the 13th of July, 1841, the Court made an order on the petition nominating *Forsyth* nominee of *L. R. Hoyes* for behoof of the legatees under that gentleman's will to his interest as a subscriber to the *Customs Annuity and Benevolent Fund*, in terms of the statute and regulations, and directing

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the petitioners to communicate the said appointment to the directors for their acceptance and admission as parties interested in the fund in terms of the statute and regulations. After some correspondence, which is more particularly referred to in the previous report, the secretary and the comptroller of the fund, on the 5th of May, 1842, wrote to Mr. *Forsyth's* solicitor a letter in which he said: "We are commanded by the directors of the fund to acquaint you that under these circumstances they have admitted the said *John Forsyth* nominee of the said *L. R. Hoyes*, in the terms of the said order of the Lords of the Council and Session, dated the 13th of July, 1841." From that time *Forsyth* paid the premiums of the policies out of the lunatic's income down to the year 1849, when, by the terms of the policies, no further premiums were payable.

On the 1st of March, 1853, the Plaintiff, *R. Urquhart*, was appointed curator by the Court of Session in the place of *Forsyth*, and on the 4th of January, 1855, he was admitted by the directors as nominee of *Hoyes* in the place of *Forsyth*. After the death of the lunatic, his will of the 10th of August, 1833, was admitted to probate in *Scotland*. At the time of his death the sum payable in respect of the policies amounted to £5864.

Lewis Hoyes, the residuary legatee named in the will of *L. R. Hoyes*, died in the lifetime of the testator; but left children who were living. Therefore, if the testator was domiciled in *England*, the bequest lapsed, but evidence was given to shew that if he was domiciled in *Scotland* the bequest would take effect for the benefit of his heirs.

By his statement of claim the Plaintiff claimed a declaration that he, as nominee of *Hoyes*, was entitled to payment of the sum of £5864, with interest: or that if he were not held to be entitled to the fund, the premiums which *Hoyes* and his curator had paid might be returned to the Plaintiff, with interest.

In the course of the argument before Mr. Justice *North*, Mr. *Cozens-Hardy*, Q.C., as counsel for the Defendant, made the following admission:—

"I admit that the nomination by the Court is as effectual as it would have been if made by the subscriber himself (being sane) in his lifetime, and the nominee had been admitted by the directors.

But I do not admit that the subscriber himself could appoint a nominee as trustee for other persons."

Mr. Justice *North* held that the interest of a subscriber to the fund, not being of the nature of property, the Court of Lunacy in *Scotland* had no jurisdiction to appoint a "nominee" on behalf of a lunatic subscriber: and that a "nominee" must be a person who is to take a beneficial interest in the fund, and not as a trustee for others. He also held that the Plaintiff was not entitled to have the premiums repaid. He therefore dismissed the action, but without costs.

His Lordship gave no decision as to the domicil of the testator.

From this judgment the Plaintiff appealed. The appeal came on for hearing on the 22nd of November, 1887.

Giffard, Q.C., and *R. Campbell*, for the Appellant:—

The learned Judge held that the Scotch Court of Lunacy had no jurisdiction to appoint a "nominee" of the fund: but in the face of the admission by the counsel for the Defendant he had no power to make such a declaration. It is a question of Scotch law, which, as a matter of evidence, is concluded by the admission of the Defendant. The effect of the order of the Court of Session was not only the appointment of a nominee, but a designation of the manner in which the money was to be applied.

The nomination being admitted to be good, the only question is whether the directors can refuse to pay the insurance money on the ground that the Plaintiff is a trustee. There is nothing in the Act or the rules that excludes trustees, and there is, on the other hand, authority for saying that a subscriber may name a nominee as trustee for himself or a third party: *In re Pocock's Policy* (1); *In re Maclean's Trusts* (2). The directors have the power to refuse to admit a nominee if they do not approve of the nomination, but if they consent to admit him, they cannot question his right to give a receipt for the money. In the present case the directors distinctly admitted the nominee in the terms of the order of the Court of Session, that is, for behoof of the legatees under the will, and the Plaintiff has acted on that admission for

(1) Law Rep. 6 Ch. 445. (2) Law Rep. 19 Eq. 274.

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many years; the directors are, therefore, estopped from saying that he is not entitled to receive the money for the purposes for which he was nominated: *Caton* v. *Caton* (1). The Defendant contends that the subscribers have no property in the fund. But that is not correct. In the cases relied on by the Defendant no nominee had been appointed. The fund is created by the payments of the subscribers, and if a subscriber dies without a nominee, and without relations, there is a resulting trust for the subscriber.

If the Court should be of opinion that the Plaintiff is not entitled to the fund, we claim a return of the premiums: they have been paid under a mistake of fact; and there has also been a failure of consideration.

Cozens-Hardy, Q.C., and *G. Henderson*, for the Defendant:—

The object of the fund was to provide a benefit for the widows and relatives of deceased subscribers. The rules were modified so as to allow nominees to be admitted to the benefit of the insurance. The subscribers have no property in the sum insured, but only a limited power of appointment over it, among the objects of the power, by deed or will. That has been decided in *In re Phillips' Insurance* (2), and *Attorney-General* v. *Rowsell* (3). The only effect of the admission of a nominee by the directors is that he is brought within the class of persons among whom the subscriber can appoint the fund. We admit that the Plaintiff has been duly nominated and admitted as a nominee, but we say that no appointment has been made in his favour. The will did not operate as an appointment, no reference being made in it to the fund. That being so, the sum insured falls into the fund, for there can be no resulting trust for the subscriber, as he had no interest in it, but only a limited power of appointment over it. If he had left relatives, they would have been entitled under the terms of the rules, but there is no rule as to destination of the money where there are no relatives. But if the order of the Court of Session was intended to operate as an appointment of the curator as a trustee for the legatees, it was invalid, as the

(1) Law Rep. 1 Ch. 137. (2) 23 Ch. D. 235.
(3) 36 Ch. D. 67, n.

directors had no power to admit the nominee on these terms. There is no trace in the rules of any power to appoint a nominee as trustee for a third party. The only power was to appoint to the nominee, and it would be a fraud on the power to appoint to him as a trustee for someone else. If a subscriber were to appoint to a child or relative, who was an object of the power, as trustee for a stranger, could that be supported? And the same principle must apply to appointments to nominees. The opinion of *Malins*, V.C., in *In re Pocock's Policy* (1), that a subscriber could appoint to a nominee as trustee for another person was not affirmed by the Court of Appeal, as it was not necessary to decide that point.

No estoppel can arise in this case: the directors were administering the fund under the Act of Parliament, and if the admission of the nominee as a trustee is *ultrà vires*, no acts of the directors could make it valid.

With respect to the return of the premiums, the Plaintiff has no ground for relief. There was no fraud: nor was there failure of consideration. When he effected the insurance, he did so subject to the rules of the fund, and to the ordinary risks of insurance. If he had recovered his reason, he might have appointed the sum insured to his nominee, and if he had married, his widow would have had the benefit of it. If there was a mistake at all, it was a mistake of law, not of fact. A mistake as to the construction of the rules is no ground for relief: *Cooper* v. *Phibbs* (2); *Earl Beauchamp* v. *Winn* (3).

Giffard, in reply:—

If the admission of the curator as trustee for the legatees was *ultrà vires*, the directors are bound to put us back into the position in which we were when the nomination was made, and return us the premiums: *In re Phœnix Life Assurance Company* (4).

1887. Dec. 3. COTTON, L.J.:—

This is an action brought against the Defendant, the person who represents the *Customs Annuity and Benevolent Fund*, and is

(1) Law Rep. 6 Ch. 445.
(2) Ibid. 2 H. L. 149.
(3) Law Rep. 6 H. L. 223.
(4) 2 J. & H. 441.

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brought by the curator of a gentleman of the name of *Hoyes*, now deceased, whose will we have before us, who for many years was in the Customs Department, and who insured his life under the provisions laid down by the *Customs Annuity and Benevolent Fund*. That was a fund which was formed by Act of Parliament, and regulated by various rules made under the powers of the Act in order to provide annuities for the widows, children, and relatives of those who are employed in the Custom House, and besides for nominees.

Mr. *Hoyes* was not legitimate, and as he left no widow and no children, he had no relatives. The question is, whether the Plaintiff, under the nominee clauses, is not entitled to claim the fund, which is a considerable one, because *Hoyes* had been many years insured in the fund.

Now, the fund, as I said, was formed under an Act of Parliament which was the 56 Geo. 3, c. lxxiii. I do not know that I need very particularly refer, after what I have said, to the provisions of the Act, except to clause 9. The general object of the fund in the first instance was to provide for the widows, children, and relatives of persons employed in the Customs House Department, and then clause 9 introduced the power of nomination: [His Lordship read the clause]. Then there is clause 16, which enables and requires the directors to make rules, which are to be approved by the subscribers, and from time to time to alter those rules.

We shall have to consider the rules, and what I think will be the rule which we shall principally have to consider is the 23rd of the rules of 1827; because although there were later rules, yet I think Mr. *Hoyes* and those who claim in respect of his insurance are entitled to rely upon that rule. The previous rules had provided that the power of appointment which is given by the rules was to be exercised by will; but this introduced something more. It enabled directions to be given by any deed or instrument or by the will of the insured.

What was the interest of Mr. *Hoyes* in the fund? It was contended on behalf of the Appellant that he must be considered to have had, subject to the power of appointment and direction given by the rules and by the Act of Parliament, an interest

in this as his estate, and that therefore it went to him, if it was not disposed of in accordance with the rules and regulations. I cannot accede to that. It is very true that the fund which is now in question was, to a great extent, composed of deductions made from time to time, under the Act and rules, from his salary; but, as I understand the Act and rules, they do not give the Plaintiff here a right to say that this was the property of the late Mr. *Hoyes*. There is a power to direct division amongst the widow, children, and relatives; and then if there are no nominees, the 23rd rule of 1827 provides how the case is to be dealt with, if there is no direction given in accordance with the rules by the person who is insured. I need not go into those; but it is disposed of with regard to the widow, and, if she has no claim, then it goes to the children, and if there are no widow or children, then it will go to his next of kin according to the *Statute of Distributions*. In my opinion (and it is supported by the cases which were referred to) we ought not to consider this as his property but merely that he had a right as regards this fund, principally arising from contributions from himself and other persons in a similar position, to dispose of it in certain particular ways.

Mr. *Hoyes*, unfortunately, became of unsound mind; and it is a question whether he was domiciled in *Scotland* or not; but the Court of Session, having jurisdiction over him (for he was in *Scotland* when he became of unsound mind) dealt with him and appointed a curator, just as we should here appoint a committee. Then after he became of unsound mind, and had been declared by the Court of Session to be of unsound mind, a question arose as to his position in the fund. He had subscribed for some years, and either he would have to go on subscribing or would forfeit the benefit to be obtained from the subscriptions which had been already made. There was some correspondence between the then curator and the directors of the fund, and the directors of the fund were quite willing to deal fairly with this gentleman. Of course, if he did not go on subscribing his interest would be lost. He had not at that time appointed or submitted to the directors any nominees whom he desired them to admit, because it was not sufficient for a person

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insured merely to submit nominees to the directors, but it was necessary that they should admit the person nominated. Then a correspondence took place, and, on behalf of the curator and on behalf of persons named in the will attempts were made to get either the legatees or the curator admitted as nominees of Mr. *Hoyes*. But the directors said, and I think very reasonably, "We cannot do this. The will is not a will in any way referring to the fund, and we shall not admit either the legatees or the curator unless we get some direction from a competent Court that we are to do so." I think there is a letter which is set out in the petition which we have to the Court of Session, not in terms but in effect, that they were willing to give every facility to admit any one as nominee of Mr. *Hoyes*, the lunatic, who was appointed by a competent Court. On this a petition was presented to the Court of Session having jurisdiction in Lunacy, as we have heard. Then two alternatives were submitted to the Court. They are asked to appoint the Petitioner nominee of Mr. *Hoyes*, "for behoof of the legatees under that gentleman's will hereto appended to his interest as a subscriber to the *Customs Annuity and Benevolent Fund*, in terms of the statute and regulations," or "to nominate and appoint the said legatees themselves for their respective interests as aforesaid to be Mr. *Hoyes*' nominees as a subscriber to the said fund and to direct the petitioner to communicate such appointment to the directors for their acceptance and admission as parties interested in the fund in terms of the statute and regulations, or otherwise to authorize the petitioner to surrender the policy effected by Mr. *Hoyes* on his life as aforesaid." He had no right to surrender the policy; but that was one of the alternatives. Then this order is made on the 13th of July, 1841: "The Lords having advised this petition nominate the Petitioner *John Forsyth* nominee of *Lewis Robert Hoyes*, for behoof of the legatees under that gentleman's will appended to this petition to his interest as a subscriber to the *Customs Annuity and Benevolent Fund* in terms of the statute and regulations, and direct the Petitioner to communicate such appointment to the directors for their acceptance and admission as parties interested in the fund in terms of the statute and regulations." The rest of the petition is dismissed, and no order made upon it.

After that was done there was a communication with the directors of the fund, and a legal opinion was taken from a person who generally advised them—not taken by them but taken by the curator. After some considerable communication, they did not only receive this nomination, but they admitted the nominee to be appointed as a nominee of Mr. *Hoyes*. Here it was very fairly admitted by the counsel on behalf of the directors of the fund that this nomination is to have the same effect (that is all I think they admitted) as if it had been made by the subscriber himself. That admission was made in the Court below by Mr. *Cozens-Hardy*, and it was repeated here, as one would expect from the persons regulating the fund, and one would be quite certain it would be done by Mr. *Cozens-Hardy*.

Now, what has been done by Mr. Justice *North*? I think he was in error. Notwithstanding that admission, which to my mind is perfectly plain, he went into the consideration of the question whether the Court of Session had power to make any nomination. In this Court the powers of the Court of Session are, as a matter of fact, to be ascertained by evidence, and, in my opinion, when the counsel for the Defendant has said that he does not want to go into that question of fact, but admits that the order was an order made by the Court of Session, which has the same effect as if it were a nomination by Mr. *Hoyes* himself, that admission of fact dispensing as it does with evidence, ought to be accepted without any question; and I think it would be wrong to say that the Court of Session, which clearly considered it had this power, did not know its own power, when the counsel for the Defendant has said "I do not want any proof that they had power, I will admit that they had."

But still, of course, that does not settle the question, because I think Mr. *Cozens-Hardy* is quite right in saying that the nomination is only to have the same effect as if it were a nomination by Mr. *Hoyes*. What is the effect of that? The admission by the directors of the fund was in the exact terms of this order. They admitted the nomination as it was, and the first objection which has been raised as to this nomination was this, that even if it had been made by Mr. *Hoyes* himself it would be a bad nomination, because under the rules and orders the nominee is to be a

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person who is to take for his own benefit. I do not think it can be said, though it is not necessary to decide it here, that the nomination must necessarily say that the money is to go into the pocket of the nominee; but I do think it was necessary when any nominee was submitted to the directors that they should know for what purpose that nomination was made and that they should be told who was really to receive and have the money. Here there was a distinct statement, that although the curator is a nominee, he is to be a nominee for behoof of the legatees named in that gentleman's will. If it be necessary that the nominee under the rules and Act of Parliament should be a person to put the money into his own pocket (and I think that Lord Justice *James* in *In re Pocock's Policy* (1), which was quoted, disposes of that), then I am of opinion that this must be taken as a nomination in favour of the legatees named in the will. The directors of the fund appear to have had a difficulty about admitting the legatees. They wanted to have some one submitted as a nominee and accepted by them who would give a good discharge for the money if it was ever paid over; and, therefore, there are here submitted to the directors the objects for which this nomination was made—persons who were to put the money into their pockets when and if it was paid. Although I do not say that this was a regular nomination, in ordinary form, yet in substance we have submitted to the directors persons who were to take the money, and the directors approved of them by admitting the curator, as on behalf of legatees named in the will.

Now, what more was done? This order was submitted to the directors. I do not know whether a copy of it was actually sent, but they must be taken to have had it submitted to them. They had the order and the petition. There was the will of this gentleman, which was a holograph will, being before the *Wills Act*, and has been proved in *England* and *Scotland*. Though they might have objected to the very purpose for which the nomination was made and for which the admission was asked, is there not here, though the instruments are irregular, sufficient to justify the Court in holding that the directors as against this gentleman, after what has taken place, cannot refuse to pay

(1) Law Rep. 6 Ch. 445.

over the sum insured so far as required for the purposes of the will. The rule, as I have already stated, to which I think we must go, is the 23rd rule of 1827. That I have referred to shortly, but I will read it again: "it shall be available in such manner and proportions as he may direct by any deed or instrument or by his will, for the benefit of his widow, children, and relatives, and for such nominees who shall have been duly admitted by the directors." Now, the substance of that is, when one gets to the nominee, not only must the person be admitted by the directors as the nominee, but if there are any objects between whom the fund is to be distributed and it is not all to go to one, the directors shall have an instrument to certify to them whom it was intended to benefit. That is to be done by an instrument and —although it might be in more regular form if the instrument was distinct from the nomination, which I do not think it necessarily was to be—if the nomination was signed by the insured stating how the nominees were to take if there were no other objects of the power—no wife, no children, no relatives, and no possible relatives—in my opinion that would be quite sufficient. But here, he being incompetent at the time to make any nomination, and his will not being of itself a sufficient appointment of this fund, the directors take this order, accompanied as it was with the will of the testator, as a sufficient nomination for the purpose of enabling the fund to be divided amongst the legatees so as to supplement and make good their legacies; and they accept the order and the will as sufficient instruments to point out to them how this fund was to be applied for the nominees, that is, either the legatees or the curator on their behalf. For many years, they went on acting on that belief and fairly acting upon it. I do not suggest there was anything otherwise than the greatest fairness on their part. Now, they have been differently advised. They have been advised they cannot properly act on that nomination. I think that is erroneous. Here is this fund to which they have accepted a nominee in a nomination pointing out for whose benefit the nomination is made and to whose pocket the fund, when it is distributed, is to go.

In my opinion, therefore, the decision of Mr. Justice *North* was erroneous, and, although here it was not a nomination which

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could have been forced upon the directors, nor a direction as to the employment or enjoyment of the fund which they could have been forced to accept, yet as they accepted it and waived any difficulty as to form, and did not raise any objection on the ground of irregularity, the mere irregularity, if there was any, treating this as a nomination made by the subscriber himself, does not justify them in resisting entirely the claim of the Plaintiff in this action, and saying there is no nominee nor sufficient direction as to how the fund is to be applied for the benefit of the nominee.

In my opinion, therefore, the Plaintiff is entitled to be considered a nominee on behalf of the legatees named in the will with a sufficient direction, by an instrument submitted to, and adopted, and approved by the directors, to say how the application was to be made.

But then there is this question. In my opinion, it is only a nomination in favour of the legatees to the extent of the benefits which they are to take under that will, and it cannot be contended by the curator that he is entitled to take it without reference to the question how far that sum of money is required for the purpose of the will. The legatees cannot by that nomination get an increase of their legacies. Their legacies will not be doubled. It may be that the legatees have been already paid out of the estate; in which case they will get nothing from the nomination and direction given by him, because it was a direction to pay this to the curator for the purpose of—I think the Scotch term would be implementing—making good the directions contained in the will; and here the residuary legatee who, if he was alive, would of course sweep off everything, died in the lifetime of the testator.

Then there comes this question. If the gentleman was domiciled in *Scotland*, that would not make a lapse, because the heir of the residuary legatee, *Lewis Hoyes*, would be put in as legatee in the place of the residuary legatee. We should say *Lewis Hoyes* or his heirs. That is to say, if he dies before the testator, his heirs would come in as substituted legatees. But I understand there is a question about the domicil of the testator which has not yet been decided, and, therefore, if the directors of the fund

require it, there may be an inquiry on that point, in order to enable us to see how far this Plaintiff can, in the events which have happened, claim this fund or any part of it.

After the other Judges have given their judgments, that will be spoken to, for the purpose of settling how that inquiry is to be made.

SIR J. HANNEN:—

I am of the same opinion. Before giving my reasons, I would observe that these transactions of which we are now considering the validity took place as long ago as 1841; that the directors of the fund had their attention called to all the circumstances of the case, and they saw the advice given by their own standing counsel, and also the advice of other eminent counsel, sanctioning the course which was suggested. They themselves required that they should have the protection of the decision of a competent Court, and that decision was accordingly obtained, and the course so recommended by counsel was deliberately adopted by the directors, and has ever since been acted upon by the payment of large sums annually out of the estate of the deceased.

Now, in these circumstances, it certainly appears to me that the Court ought not to be astute in discovering reasons why this transaction should be defeated; on the contrary, if any reasonable construction can be put upon it by which it may be maintained, it is our duty to adopt that construction. It appears to me there is such a reasonable construction. The Act, no doubt, is an Act primarily for the creation of a fund for the benefit of the wives and children or other relatives of officers in the Customs; but power is given, by the 9th section of the Act, to introduce certain other persons, though entirely subject to the control and discretion of the directors. [His Lordship read the section.] That was to be carried out under rules which would have the force of an Act of Parliament, and, in the first instance, the rule which was in force was the 25th of those which were made in June, 1819. By the language of that rule it is left in considerable obscurity, as it seems to me, how the nominees were to be admitted; but I need not dwell upon that,

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because, whether it was thought necessary to alter the effect of that rule or merely to amend its language, it was altered by the rules of 1827, to the benefit of which the subscribers in this case became entitled. By rule 23 it is provided that the fund shall "be available in such manner and proportions as he may direct by any deed or instrument or by his will, for the benefit of his widow, children and relatives, and for such nominees who shall have been duly admitted by the directors." Now, it is to be observed that that only shews that the insured is to direct by "deed or instrument." Any form of instrument, therefore, is sufficient. No formalities are prescribed, and if there is anything which fulfils the description of an instrument, by which the insured has conveyed his direction to the directors, as to the nominee whom he desires to be admitted, and they accept him, the terms of that rule have been fulfilled.

Now, this gentleman having become insane it was undoubtedly impossible for him personally to put in force the powers given to him by the insurance and the rules. In these circumstances application was made to the Court of Session in *Scotland* for them to give that direction which should be a protection to the directors in making any disposition of this fund. An admission was made in the course of the case that that order of the Court of Session should be as effectual as it would have been if made by the subscriber himself, being sane, in his lifetime. Mr. Justice *North* has considered that he was not bound by that admission. It appears to me, however, for the reasons which have been given by Lord Justice *Cotton*, that that is incorrect. Questions of Scotch law are dealt with in English Courts as questions of fact over which counsel have control, that is, in the sense of being empowered to dispense with proof of them by admission. It appears to me, therefore, that the effect of that admission is, as it is said, that we must deal with the case precisely as though the substance of that order had been communicated to the directors by the deceased himself. Now, what would be the effect of that? It would have been a distinct intimation to them that he desired the person named to be admitted as his nominee, and not only that, but that he desired it to be for the benefit of the persons mentioned in the will. Reserving for the moment the question

whether or not any person could be appointed nominee not for his own benefit but for the benefit of anybody else, is it not clear that that would have been effectual? It not only appoints the nominee but it expresses the purpose for which he is to be admitted as nominee, for the benefit of certain persons who are named or described. Upon this point we do not differ from the opinion expressed by Mr. Justice *North*, because I see that he was of opinion that the argument which had been urged before him, that the introduction of the name of the nominee was only to bring the person so named within the class of persons who could take the benefit of some subsequent instrument or disposition on the part of the directors, had been pushed too far, and he says: "If there was nothing but a nomination by the insured of the person to stand in the position of a relative, it does not seem to me there would be anything to point out what his interest was, and it may be that if the insured died intestate and without making any other disposition, the nominee would stand in the same position as a relative taking an interest in the fund. But, on the other hand, if the insured were to make a nomination, and at the same time to say that that nomination was to be for the benefit of the person named, it seems to me then the nomination would fulfil the double purpose of bringing the person named within the objects of the power, and conferring a benefit upon him." As I say, reserving the question of whether the nominee could take for the benefit of anybody else, that appears to me to be the correct view of the effect of the Act. Here the order distinctly describes not merely the person who is to take for the purpose for which that nominee has been appointed so to take, namely, for the benefit of other persons, but it contains in itself at that time not merely a nomination but a direction as to the manner in which the deceased intended his interest in that fund to be disposed of.

Then there only remains the question of whether or not a nominee must be a person taking solely in his own interest. In my opinion that is not the meaning of the language used by the rules. I agree that the directors must have the full opportunity of exercising their discretion whether they will admit the nominee or not, but if they know all the circumstances, if they see that

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the purpose for which the nominee is intended to be introduced is one which they approve of, then we are entitled and bound to couple the interest of the persons who are the ultimate objects of the insured's bounty together with the individual who is named to take on their behalf; and that seems to me to be the view which the Court of Session took, and which would make clear the meaning of the language of their order, upon which some comments have been made. They direct that *Forsyth* is to be appointed "a nominee of *Hoyes* for behoof of the legatees under that gentleman's will appended to this petition," and then they give a further direction: "that the petitioner communicate the said appointment to the directors for their acceptance as parties interested in the fund in the terms of the statute and regulations"—by which they appear to have meant that according to their view the admission of *Hoyes* as nominee for these legatees would make them parties interested, and they request that the directors will on that footing admit these several persons as parties interested in the fund in the terms of the statute and regulations. The directors have not altered the form; they have not made any restriction, but they have admitted *Forsyth* in the terms of the order of the Court. It appears to me, therefore, that they intended, as the Court intended, that the nominee for behoof of the legatees and the legatees were to be treated as the nominees of the person interested in the manner described in that order, namely, to take the interest which the insured himself had power of disposing of.

Several cases have been referred to, and there is only one case in which the question which has been discussed before us has really arisen, and that was in *In re Maclean's Trusts* (1). In that case the late Master of the Rolls held that a nominee could take as trustee for others, and the only adverse comment on that decision which has been brought to our notice is that there was very little to deal with; but the late Master of the Rolls was not a Judge to decide a case contrary to what he thought was the law because the amount in dispute was small. That, as I say, is the only case in which the question has arisen, because in the other cases no nominee had been admitted by the directors.

(1) Law Rep. 19 Eq. 274.

For these reasons it appears to me that the decision of Mr. Justice *North* cannot be maintained.

LOPES, L.J.:—

I agree, and I have nothing to add.

1887. Dec. 5, 6. The appeal was further argued on the question of the domicil of the testator *L. R. Hoyes*, which it had become necessary to decide in consequence of the previous decision of the Court. It was admitted that the general estate was sufficient to pay the other legatees, and that the only persons who could claim an interest in the *Customs Annuity and Benevolent Fund* were the heirs of the residuary legatee. Evidence was given that according to Scotch law, an infant of the age of fourteen was competent to choose his place of residence and his domicil.

Giffard, Q.C., and *R. Campbell*, for the Plaintiff:—

Our contention is that the testator was domiciled in *Scotland*, consequently that his will must be construed according to the Scotch law, under which the residuary bequest did not lapse by reason of the death of the legatee in the lifetime of the testator, but went to his "heirs." The testator was brought to *Scotland* at the age of seven, his domicil at that time being that of his mother, namely Portuguese, he being illegitimate. He remained in *Scotland* till he was eighteen when he went to *Yarmouth*, having been appointed to an office in the English Customs. During that interval he was subject to the Scotch law, and his acts and contracts must be governed by that law, not by Portuguese law. According to Scotch law the evidence which has been produced shews that infancy terminates at the age of fourteen so far as to enable the infant to choose his place of residence and country of domicil: *Story's* Conflict of Laws (1); *Fraser's* Personal and Domestic Relations (2); *Fraser's* Husband and Wife (3); *Male* v. *Roberts* (4). In the present case there is evidence to shew that the testator after he attained the age of fourteen elected to take

(1) 5th Ed. sects. 97, 103.
(2) Vol. i. p. 717.
(3) Vol. ii. p. 1317.
(4) 3 Esp. 163.

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a Scotch domicil. He always spent his holidays in *Scotland*, and after he left *Scotland* to perform his duties in *England* he retained his rooms at Mrs. *Gordon's* house in *Scotland* and kept his desks, books, and musical instruments there, shewing that he considered that as his home; and he came to *Scotland* on several occasions when he had a holiday. His acceptance of an office in the English Customs Department is no evidence of his intention to take an English domicil: *Sharpe* v. *Crispin* (1); *In re Macreight* (2); *Attorney-General* v. *Rowe* (3); *Douglas* v. *Douglas* (4); *Dicey* on Domicil (5). Therefore the Scotch domicil which he had assumed continued till his death.

Cozens-Hardy, Q.C., and *G. Henderson*, for the Defendant:—

In order to succeed the Plaintiff must shew two things, first, that the testator had the power before he attained twenty-one to throw off his domicil of origin, which was Portuguese, and assume a Scotch domicil; and, secondly, that he did in fact elect to assume a Scotch domicil. With respect to the first point we contend that he had no such power. The evidence of the Scotch advocate only shews that according to Scotch law a Scotch minor can select his domicil at the age of fourteen; it does not prove that a minor who has a foreign domicil and may be for the time resident in *Scotland* can select his domicil at that age. The testator had without doubt a Portuguese domicil when he was fourteen, and as such he had a personal incapacity for binding himself by any acts or contracts: *Sottomayor* v. *De Barros* (6). No one can put off his domicil of origin until he is *sui juris* and does some act distinctly shewing his intention: *Udny* v. *Udny* (7).

But if the testator in the present case had the power to put off his domicil of origin he has shewn no intention to do so. He was educated in *Scotland*, with the exception of a short time when he was in *Germany*, living with and under the control of his reputed father's relatives. In 1824, before he came of age,

(1) Law Rep. 1 P. & M. 611.
(2) 30 Ch. D. 165.
(3) 1 H. & C. 31.
(4) Law Rep. 12 Eq. 617, 639.
(5) Pages 139, 159.
(6) 3 P. D. 1; 5 P. D. 94.
(7) Law Rep. 1 H. L. Sc. 441.

employment was obtained for him in the English Customs Department and he was sent to *Yarmouth*, and in 1825 he went to *London* in the same service. There he remained with short occasional visits to *Scotland* till 1834. The only evidence therefore of intention to change his domicil is his employment in the English Customs and residence in *England*. That is sufficient on the authorities to shew an election to assume an English domicil: *Marsh* v. *Hutchinson* (1); *Bruce* v. *Bruce* (2); *Forbes* v. *Forbes* (3); *Munroe* v. *Douglas* (4). If there was no election of an English domicil, there was at all events no election to assume a Scotch domicil, in which case the Portuguese domicil would remain, and the Plaintiff must equally fail in his present claim.

Giffard, in reply, referred to *Johnstone* v. *Beattie* (5).

1887. Dec. 9. COTTON, L.J.:—

This is a further hearing of an appeal upon a point reserved in our former judgment.

The question we now have to try is this: what was the domicil of *Lewis Robert Hoyes* at the time he died? That is material, because if he was a domiciled Scotchman, as alleged by the Appellant, his will will have effect as regards the ultimate residuary gift, which it will not have if he was not so domiciled. The only question, therefore, is whether he was domiciled in *Scotland* at the time of his death.

His history is a curious one. He was born in 1806. His father was a Scotchman in the service of the *East India Company*, and he formed a connection with a native woman, who I understand was a native of *Goa*, or residing there at any rate, and this *Lewis Robert Hoyes* was a son born from that connection. He was illegitimate. He was born in the *East Indies*, and in 1813 was sent home to *Scotland* by his father to the relatives of his father who lived at *Forres*. The boy arrived there either in 1813 or 1814. Being born in 1806 he attained fourteen in 1820. The contention on behalf of the Appellant is that according to Scotch law, from that time, before he attained twenty-one, he was able to

(1) 2 B. & P. 226.
(2) Ibid. 229, n.
(3) Kay, 341.
(4) 5 Madd. 379.
(5) 10 Cl. & F. 42.

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elect a domicil, so as to acquire a domicil different from his domicil of origin, which would be, under the circumstances, as his mother lived at *Goa*, Portuguese. The question which we have to consider is whether on the evidence before us he, either before he attained twenty-one or after he attained twenty-one, elected a domicil in *Scotland*. I say that, not forgetting the nicety of the question, whether by the law of *Scotland* a foreign infant could elect domicil; but it is not necessary to decide that having regard to the opinion which I have formed on the evidence; but I assume that by the law of *Scotland* applicable to this case he could after fourteen, though still an infant, elect as to his domicil. We do not know much about his history, but we have statements made to us by certain of his father's relatives who remembered him when a boy and give an account of him. He first of all lived at *Forres* with one relative of his father and was sent to school at *Forres*. I do not know whether that was before he attained fourteen or not. Then he was afterwards at school at *Banff*, and afterwards, though we do not know at what precise age, he went to *Germany* in order to finish his education. In the year 1824 he went to *Yarmouth* and in the following year to *London* in the English Customs House Department, being an officer in that service. I do not think it quite appears what his position was at *Yarmouth*, but he was in the Customs House service. Then in 1827 he became of age, and till 1834 he held still the same position, going back to *Scotland* occasionally, and holding that position in the Customs he lived, except when he went at short intervals for short times to *Scotland*, either at *Yarmouth* or in *London*.

Now is there evidence on which we can hold that before he was twenty-one he elected domicil in *Scotland?* I cannot find in the evidence enough to justify us in so holding. The only thing which was relied upon was this, that he resided with the relatives of his father, who may be called his relatives, at *Forres*. That was the place where he resided except so far as he was sent abroad and lived abroad till he went to *England* in 1824. But I see nothing to shew an election of domicil or to fix his permanent residence in *Scotland*. I do not see what this boy could do except go to live, when he was not at school, with those relatives of his

father who were willing to receive him, willing to give him a home, and willing to provide for his maintenance. Being there he was not exercising any choice at all. It is difficult to see, in a case like this, what could be done by a lad under twenty-one to elect a domicil different from his domicil of origin. Of course, if he shewed a determination to take up permanent residence in *Scotland*, that might amount to it, but I cannot see it here. In 1818—at all events before 1820—his father had died. There is no suggestion that he could have gone out to his father before that, in fact, before he was fourteen the law of *Scotland* could not give him any power to elect domicil, and after that time, his father, who recognised him and brought him up, being dead, it was a matter of necessity, not of choice, to him to go back, when he had his holidays, to those relatives of his father who treated him as his father's son and were ready to receive him. Of course, it could not be said that by going to school in *Scotland* he had elected to have a residence in *Scotland*. It would not be his own act going to school; it would be the act of those who had the charge of him and sent him there. One does not often hear of boys electing to go to school anywhere, and there is no suggestion that he elected to go to school either at *Forres* or at *Banff* in preference to any other place. In my opinion, up to the time when he became twenty-one there is nothing that would justify us in holding that he elected domicil so as to get rid of that domicil of origin which clings to a man until by his own act he elects and gets some other domicil; because even though he may wish to have another domicil, that will not get rid of the domicil of origin unless he acquires by choice and by residence another domicil. Then after he attained twenty-one, which, as I said, was in 1827, did he do any act to elect domicil in *Scotland*, or do anything which could make that his permanent residence? Even if he shewed any intention to reside permanently and ultimately in *Scotland*, I should feel a great difficulty in saying that after he attained twenty-one he did in fact acquire by election a Scotch domicil, because, as I have mentioned, in order to get rid of domicil of origin it is not only necessary to wish to get another domicil, but it is necessary that there should be act as well as will. Wish will not be sufficient to get rid of domicil of origin. There

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must be a residence in another place with an intention of making that his permanent residence. Of course, the domicil of election may be got rid of, and if that is got rid of, then the domicil of origin will revert again until a new domicil is acquired, though the first domicil of election has been abandoned.

What ought we to hold to be his domicil. He was by domicil of origin a Portuguese. Did he not, on entering the service of the Crown in *England* and residing in *England* for the purposes of performing his duty, do enough to shew an election to reside as an Englishman in *England*, as that part of the country to which his duties called him? If he had been a domiciled Scotchman at the time when he entered the service of the Crown, residing in *England* for the purpose of performing his duties in that service, that would not have been a change of domicil, because he was already domiciled in part of the King's dominions, and by going to another part of the King's dominions for the purpose of doing his duty as a servant of the Crown, he would not have lost his domicil in *Scotland*. But we have to deal with him at the time when he went to *England* as a domiciled Portuguese; and, in my opinion, the difference is great, and by residing in *England*, though for the purpose of performing his duties in the service of the Crown, there was enough to shew an intention to make that his residence, not only for a limited period, but so long as he should remain in that service, which in all probability would be during the term of his natural life. We know that in 1835 he was found lunatic, and although after that time he resided in *Scotland*, yet, of course, when he was a lunatic unable to exercise any will, his residence in *Scotland*, whatever his wish may have been, cannot have any effect.

The only thing, I think, relied upon in support of the contention of the Appellant, that he elected domicil in *Scotland* and acquired it after he became of age, was that from time to time he went home to *Forres*. I call it home because it was the home of his father and the home of the relatives of his father, with whom he lived, and occupied always one room, and paid a rent for that room. But, in my opinion, that is not sufficient to counteract the effect of his actually living in *England* while in the service in which he had entered when he left *Scotland*.

Therefore, we must hold that this gentleman was not at the time of his death a domiciled Scotchman, although it is not necessary to decide that his domicil was English.

That affects very much the contest here. It is unfortunate that this point was not considered in the Court below, because this nomination and admission by the directors of the fund was, as I have already expressed, a nomination and admission for and on behalf of the legatees named in the will; that is, the residuary legatees, for it is admitted that his estate, independently of this fund, is sufficient for payment of his pecuniary legacies. In my opinion, therefore, that nomination and admission, though effectual as a nomination and admission, has become inoperative, because the purposes for which the nomination and admission were made did not require that this fund should be applied in accordance with that nomination and admission. The result is that, notwithstanding our previous decision, the appeal fails, and the action must be dismissed.

LINDLEY, L.J.:—

Upon this question which was argued before us some points of law were raised which are by no means easy to solve, and if it were necessary to solve them I should desire to take a little further time to look into them; but I am satisfied that the case not only can be disposed of, but ought to be disposed of on the facts.

I cannot come to the conclusion upon the facts that this gentleman had acquired a Scotch domicil when he entered the Customs in *England* in 1824. Assuming, what I think is extremely doubtful, that he could have done it, that he had the right to choose a domicil, it appears to me, when you come to understand the exact position of this young man, the evidence does not establish anything of the kind. He attained fourteen, when it is said he could elect a domicil, in 1820, and from 1820 to 1824, which is the crucial period, the first portion at all events of the crucial period for examination, the facts come to nothing more than what Lord Justice *Cotton* has said, and I do not think they amount to anything nearly sufficient to convert this gentleman from a Portuguese into a Scotchman by domicil. He

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attained twenty-one in 1827. If you look at the evidence it appears to me unless he was a domiciled Scotchman before 1824 the evidence is very weak indeed to shew he elected in 1824 to be domiciled in *Scotland*. In fact, the evidence to my mind is very strong the other way, because although it is very true he passed his holidays when he could in *Scotland*, yet it is remarkable that he refers to those visits as "trips," which so far as it goes, negatives the idea that he had a domicil in the sense of a settled home in *Scotland*.

It appears to me, therefore, upon the facts, that the allegation that this gentleman acquired a Scotch domicil is not established. If we had to decide between a Portuguese and an English domicil on this evidence as it stands, I should say he acquired an English domicil. I do not think that it is necessary to determine that; but he certainly did not acquire a Scotch domicil, and that is, as it appears to me, sufficient for this case.

LOPES, L.J.:—

It is unnecessary to re-state the facts of this case, which have already in the judgment delivered by Lord Justice *Cotton* been very fully stated.

A question arose in the case, in respect of which no English decision exists, as to whether *Lewis Robert Hoyes*, a Portuguese, was capable of acquiring a Scotch domicil at the age of fourteen—whether in point of fact the law of his domicil of origin, that is, of *Portugal*, was to determine the time when his minority ceased and he was to be capable of acquiring a domicil, or the law of the country, that is, *Scotland*, where the domicil was to be acquired. The age it was said, at which a domicil can be acquired in *Scotland* is fourteen. The point is one of great difficulty. It is, however, unnecessary for the Court to decide it in this case, because we are of opinion that, assuming that a foreign infant can acquire a domicil at fourteen in *Scotland*, *Lewis Robert Hoyes* did not acquire in fact a domicil in that country.

I will state my reasons; but first I will consider what is necessary for the acquisition of a domicil. Every person begins life as an infant, and therefore as a dependent person. When he become an independent person, or, in other words, when he

attains majority, he has a domicil, which is called his domicil of origin. He can then obtain for himself, by his own act and will, a domicil different from his domicil of origin, which is called his domicil of choice. This domicil is acquired by the combination of residence and the intention permanently to reside in a given country. There must be the act of residence, and the intention to remain. There must be the opportunity of exercising a choice, for if there is no alternative it cannot be said there is volition or choice.

Lewis Robert Hoyes in 1824 entered the Customs at *Yarmouth*, and in 1825 was transferred to *London*. Between 1813 and 1824 he had resided in *Scotland* with relatives of his putative father. He went to school at *Forres* and *Banff*, and finished his education on the continent, spending his holidays with his relatives in *Scotland*. During the whole of this time he was under the control and supervision of his relatives, he had no residence which he chose for himself, and had no alternative but to reside where his relatives thought it best he should reside.

It appears to me in these circumstances that he had no such residence of his own, and no such power of exercising a choice, as is necessary to constitute an abandonment of his domicil of origin, and acquisition of a new domicil. When he attained twenty-one he was living in *London*, he lived there for nearly the whole of the year continuously, making occasional trips into *Scotland* to see his relatives. He remained in *London* in the service of the Customs till 1834 when he returned to *Scotland* infirm, and became a lunatic in 1835. It seems to me that by residence and by an intention to remain in *London* he acquired a domicil in *England*. There can be little doubt but that if he had remained sane, he would have passed the rest of his life in the service of the Customs, residing in *London* where his occupation was, and where he earned his livelihood. I do not attach much importance to the fact that he kept some books, a desk, and musical instruments in a room which he rented of Mrs. *Gordon* in *Scotland*, when I find that he nearly always resided in *London*, with, in my opinion, an intention of remaining there. If *Lewis Robert Hoyes* had been a domiciled Scotchman service of the Crown in *England* would not have caused a loss of his

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Scotch domicil. He was, however, a foreigner, and, according to the authorities, a different doctrine applies.

I am of opinion that *Lewis Robert Hoyes*, upon the evidence adduced before us, was domiciled in *England*, and that his will must be construed according to English law. In these circumstances, the residuary legatee having died in the lifetime of *Lewis Robert Hoyes*, the residuary gift lapses, which means in this case that it falls into the fund.

The appeal must be dismissed.

Solicitors for Plaintiff: *Ford, Ranken Ford, & Co.*
Solicitors for Defendant: *Foss & Ledsam.*

M. W.

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MIDLAND RAILWAY COMPANY *v.* ROBINSON.

[1887 M. 3583.]

Railway Company—Mines near Railway—Notice by Owner of Intention to work—Injunction—Minerals worked by quarrying—Railways Clauses Act, 1845, *ss.* 77, 78 [*Revised Ed. Statutes, vol. ix., pp.* 726, 727].

An owner of minerals under or near a railway is entitled to give notice, under sect. 78 of the *Railways Clauses Act*, 1845, of his intention to work them, although he intends to let them and not to work them himself.

But a notice given without any real intention or probability of working or letting the minerals would be invalid, and the Court would restrain the owner from acting upon it.

Such a notice is not invalid or unreasonable merely because it includes the minerals under a long extent of railway.

The 77th and 78th sections of the *Railways Clauses Act*, 1845, apply to minerals worked by open quarrying as well as those which are got by underground working.

Midland Railway Company v. *Haunchwood Brick and Tile Company* (1) approved.

THIS was an action for an injunction to restrain the Defendant, the Rev. Sir *Frederick Laud Robinson*, from working minerals under and adjoining the *Kettering, Thrapstone, and Huntingdon Railway*, which was worked by the *Midland Railway Company*, in such a way as to injure or damage the railway.

The railway was constructed under Acts of Parliament passed

(1) 20 Ch. D. 552.

in 1862 and 1863, which incorporated the *Lands Clauses Act*, 1845, and *Railways Clauses Act*, 1845, and was leased to the *Midland Railway Company* in 1876. The railway passed through the lands of the Defendant for about a mile and a half in the parishes of *Cranford St. John* and *Burton Latimer*, in the county of *Northampton*.

The land contained ironstone, limestone, brick-earth, clay, and sand. The minerals under the greatest portion of the Defendant's land adjoining the railway were leased to the *Staveley Coal and Iron Company*, but the minerals under the remaining portion of the adjacent lands and also immediately under the railway in that portion which was leased to the *Staveley Coal and Iron Company* still remained in the hands of the Defendant.

On the 25th of January, 1886, the Defendant served a written notice on the *Kettering, Thrapstone, and Huntingdon Railway Company*, under sect. 78 of the *Railways Clauses Act*, 1845 (1), that he was desirous of working the mines and minerals under the railway and adjoining thereto, as set out in the plan annexed to the notice, and that it was his intention to work the said mines and minerals after the expiration of thirty days.

This led to negotiations with the company, which ultimately fell through. On the 3rd of August, 1887, the Defendant's solicitor wrote a letter to the solicitors of the company in which they said: "Unless we hear from you by Saturday next, the 6th inst., that the company are prepared to treat, we are instructed to say that Sir *Frederick* will immediately commence to work the

(1) 8 & 9 Vict. c. 20, s. 78: "If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company, and such owner, lessee, or occupier do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

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minerals, with the result that all traffic on the line will be stopped." After some further correspondence the present action was brought by the two railway companies against the Defendant; and on the 28th of October, 1887, they moved for an injunction till the hearing.

The Defendant, Sir *F. Robinson*, stated in his evidence, that his intention was to let the minerals which were still in his hands as soon as this action was disposed of, and that he had had offers by persons who were willing to take them, and that he was advised by his mining agents that they could be worked at a profit. Mr. *Birch*, a mining agent, also stated that the minerals could be worked at a profit, even under the railway, which could be supported by props.

It was in evidence that the ironstone and limestone was always in that part of the country worked by quarrying.

The motion came on for hearing before Mr. Justice *Chitty* on the 25th of November, 1887.

Sir *A. Watson*, Q.C., and *Phipson Beale*, for the Plaintiffs:—

The notice of the 25th of January, 1886, was bad because there was no *bonâ fide* intention on the part of the Defendant himself to work the minerals.

[CHITTY, J.:—Is not the notice good in point of form?]

That may be admitted; but unless the person giving the notice not only has the right to work, but is prepared himself to work the mines, the railway company is under no obligation to make compensation: *Smith* v. *Great Western Railway Company* (1); *Great Western Railway Company* v. *Bennett* (2). A notice of the owner's intention to work cannot be good for the purpose of enabling his lessees to work, and there must also be an intention to work immediately, and not a mere general indefinite intention to work at some future time. Having regard to the language of sect. 79, "so that the same may be done in a manner proper and necessary for the beneficial working thereof," the Defendant is not entitled to work the mines by open quarrying in a manner detrimental to the company; and we contend, further,

(1) 3 App. Cas. 165. (2) Law Rep. 2 H. L. 27.

that as it appears by the evidence that the minerals in consequence of the Defendant's own acts can no longer be worked at a profit he has lost his right to avail himself of the provisions of the Act.

Romer, Q.C., and *Percy Gye* (Sir *H. Davey*, Q.C., with them), for the Defendant:—

As the legal owner of the minerals under and adjoining the line of railway the Defendant has full power to work them after giving notice of his intention to the company pursuant to the *Railways Clauses Act*, 1845, s. 78. The Plaintiff company contend that the minerals cannot be worked at a profit, but they cannot be allowed, so long as the notice is valid, to inquire into the Defendant's motives for serving it. The evidence, moreover, shews that the Defendant has a *bonâ fide* intention of working the minerals, and not only that they can be worked, but that they will be worked, and that there are persons who are ready, and have offered, to work them. The term "beneficial working" used in sect. 79 means a working beneficial to the owner himself in order to win the largest quantity of minerals that the mine will yield, just as if he had never sold any part of the surface at all, and under no other obligation than that he is to win the mines in a proper manner: *Great Western Railway Company* v. *Bennett* (1). The words "other minerals" used in sect. 77 will clearly include clay, and are not confined to minerals got by underground workings: *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (2); *Midland Railway Company* v. *Miles* (3).

Sir *A. Watson*, in reply.

CHITTY, J.:—

The object of this motion is to restrain the Defendant from working the minerals, of which he is owner, in a strip of land about a mile and a half long under the railway and lands adjoining. The Plaintiffs say that a notice which has been given by

(1) Law Rep. 2 H. L. 27. (2) 20 Ch. D. 552.
(3) 33 Ch. D. 632.

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the Defendant under sect. 78 of the *Railways Clauses Act*, 1845, is a bad notice, and therefore that the injunction ought to go. Now the notice which was given in January, 1886, is a good notice on the face of it, and there is no objection with regard to form. But it is said that the notice was bad because there was no intention to work at once, and that every notice is consequently bad unless the person who gives it intends to proceed at once to work. By that of course working before the expiration of the thirty days allowed by sect. 79 is not meant; but I understand that the argument goes so far as to say that the man must actually intend to work upon the thirty-first day. I cannot accept that, because the words "at once" are not to be found in sect. 78. But then it would be said in furtherance of a similar argument, that there must be the intention to work within a reasonable time. Of course if that were a good proposition of law the question of what is a reasonable time would arise.

Now, when this notice was given I am satisfied that the Defendant, who is owner of the mines and minerals to be found within the strip of land in question, was desirous of working. I do not think it is necessary that he should have an intention to work immediately, if he had a present intention to work within some reasonable time; and, therefore, accepting, for the purpose of the argument only, the construction which I am asked on behalf of the Plaintiffs to put upon sect. 78, I say that in this case there was an intention to proceed to work the minerals within a reasonable time after the notice. That I think is shewn not only by the direct evidence on oath of the Defendant and his engineers and advisers, but also by reason of the other circumstances. Within a very short time after the notice was given—in the summer certainly of the same year—trial holes were sunk by the Defendant, or by his directions, which is the same thing, for the purpose of ascertaining where the ironstone was, what ironstone there was, and what other minerals were to be found under the land in question. Though there has been no actual working between the date of the notice and the present time, that is because, as the Plaintiffs themselves admit, there have been negotiations about this matter. Therefore, I hold that the notice was a good notice so far as this particular point is concerned.

There is no limit of time expressed in sect. 78, and it is not necessary, putting an outside case, to say whether a notice giv a year, or two or three years before, of the intention to work would be good. I make one observation, however, upon that construction of the Act, which is that if the decisions on the subject had gone to the length of saying that the railway company must give its counter-notice within thirty days, the argument on behalf of the Plaintiffs would have been much more forcible. But the House of Lords has decided that the railway company are free to give notice at any time; and the thirty days' clause is a clause for the benefit, unquestionably, of the railway company; and prevents, under any circumstances, the owner of a mine from working before the expiration of that time. If an idle notice is given the railway company may hold their hands, and wait: they are under no obligation to give a counter-notice, and they may wait until they see there is a reasonable probability of working.

I make these observations for the purpose of shewing why I reject the construction that necessitates putting words into the Act. It does not appear to me to be the right mode of construing any Act of Parliament to introduce words into it which are not there. It leaves open the general point, which I am not going to decide unnecessarily upon a motion, as to whether a notice given by a man who may, under certain circumstances, not work, and is not likely to attempt to work, for years to come, would be a good notice. I think that the Defendant did intend to work within a reasonable time.

Then there is some question, which I have had a little difficulty in following, whether there are or not minerals under this property. The Defendant says there are. The Plaintiffs do not by their witnesses say there are not. As a matter of fact, it seems to me that it is shewn by the evidence that there are valuable minerals there—ironstone, and, in some parts, limestone. I am not called upon to express an. opinion as to earth, sand, and so forth. There is no question raised, or argued, before me about that. There is some case, I understand, pending before the House of Lords in which the question of what are mines and minerals within this Act of Parliament may be considered by the

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House. But at the present moment the contest is only with regard to those things which clearly are minerals, namely, ironstone and limestone. I mention that for fear there should be any misapprehension with regard to some of these smaller things which are mentioned in the notice.

Then the Plaintiffs' witnesses say that this notice cannot be *bonâ fide*, because the minerals cannot be worked at a profit. That is the substance of the evidence; and the Defendant's witnesses take a contrary view, as scientific men, or experts, of this class not unfrequently do differ upon such matters. They say they can work, and intend to work them. I do not think I am called upon to decide which of these sets of skilled men are correct in the views that they take; but there is one obvious observation upon this point: that if the Plaintiffs are right, that there is nothing that can be got at a profit, they may safely give their counter-notice with the effect only of having to bear the whole, or some part of the costs of going before the proper tribunal under the Act of Parliament for the purpose of ascertaining the value or the compensation to be paid; and if they are right, there will be little or no compensation to be paid by the railway company for the minerals that are there.

I think that this is substantially the whole case, except one point that I must now proceed to mention. It is argued that the Defendant does not intend to work in the manner in which he is entitled to work under the Act of Parliament. The language referred to is that of sect. 79: "so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate." It is said first, as a general proposition, as I understand it, that by reason of lettings on both sides the mine-owner cannot work consistently within this section. First it seemed as if some special meaning adverse to the Defendant was intended to be put upon the words "beneficial working;" but those words have been explained in previous decisions, the effect of which is that "beneficial working" are words introduced for the benefit of the mine-owner. If the Legislature had left his rights of working on the words "proper and necessary manner," there might have been, as was admitted

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in the reply, two modes of working, and the railway company might have been entitled to say "you shall work in the manner most beneficial for us." But the meaning of "beneficial working," as interpreted by the authorities which bind me, is, that the mine-owner getting in a proper and necessary manner may get also in a manner beneficial to himself. They are words of qualification inserted for the benefit of the mine-owner.

Then he must work according to the usual manner of working the mines of the district. But in this case it is shewn that the proper and usual mode of working minerals of this class is by quarrying. Upon this it was said that open quarrying was not permissible; but it was admitted that there were authorities upon that point which clearly bind me, which I am not at liberty to overrule, and at which it would be useless for me to cavil.

The result is that the working by open quarrying is a thing which I will not say is not a permissible mode of working under the section, and it would be wrong if I adopted the argument that, seeing this is a long strip, the Defendant cannot work the minerals there at all in accordance with sect. 79. I cannot accept that argument. I think the mine-owner is entitled, unless a counter-notice is given, to get and work these minerals, provided he works in a manner consistent with the 79th section; and there is nothing on the evidence, beyond this quarrying, to shew that the Defendant does intend to work in any manner which would be maliciously detrimental to the railway company. I think, therefore, the motion fails. Costs will be costs in the action.

F. G. A. W.

C. A.

From this judgment the Plaintiffs appealed. The appeal came on for hearing on the 14th of December, 1887.

Rigby, Q.C., Sir *A. Watson*, Q.C., and *Phipson Beale*, for the Appellants:—

The Defendant had no *bonâ fide* intention of working the mines. If there was no such *bonâ fide* intention the notice is void; *Flower* v. *London Brighton and South Coast Railway Company* (1); *Errington* v. *Metropolitan District Railway Company* (2).

(1) 2 Dr. & Sm. 330. (2) 19 Ch. D. 559.

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He says in his evidence that he intended to let them. If so the lessee was, the person who ought to give the notice. The company are not bound to give a counter-notice before the thirty days' notice has expired; they are entitled to wait till they have a fresh notice from the owner or the lessees that they are prepared and intend to work the mines: *Dixon* v. *Caledonian Railway Company* (1); *Smith* v. *Great Western Railway Company* (2). The notice is also shewn not to be *bonâ fide* by the great extent of line, a mile and a half, to which it applies. So wide a notice is unreasonable and embarrassing. The word "mines" in the 78th section does not include quarries. It only refers to the taking of minerals by underground working: *Darvill* v. *Roper* (3); *Bell* v. *Wilson* (4). The decision of Mr. Justice *Kay* in *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (5) has not been sanctioned by the Court of Appeal in any case, and the same point is now before the House of Lords; and, moreover, it was decided on a different section, namely, the 77th.

Sir *Horace Davey*, Q.C., *Romer*, Q.C., and *Percy Gye*, for the Defendant:—

There is nothing in the Act that indicates that the landowner cannot give notice unless he intends to work the mines himself. The construction contended for by the Appellants would be unreasonable, and would prevent the landowner in most cases from getting the benefit of his minerals. He is at liberty to work them in such a way as may be most beneficial to himself. The wideness of the notice does not make it oppressive or shew that it is not *bonâ fide*. A landowner need not confine himself to the particular part of the mines which he intends to work immediately. Such a course would be unreasonable, for it would necessitate a separate arbitration in each case. Nor is the narrowness of the slip and the danger to the company from working it an objection. The company are not bound to pay for support in the first instance; they can either protect themselves by purchasing it at once, or can postpone the payment till the neces-

(1) 5 App. Cas. 820.
(2) 3 App. Cas. 165.
(3) 3 Drew. 294.
(4) Law Rep. 1 Ch. 303.
(5) 20 Ch. D. 552.

sity arises; but in any case they cannot prevent the landowner from taking the minerals without giving him compensation: *Great Western Railway Company* v. *Bennett* (1); *Smith* v. *Great Western Railway Company* (2); *Loosemore* v. *Tiverton and North Devon Railway Company* (3).

[They were stopped on the question of working by means of open quarrying.]

Rigby, in reply.

COTTON, L.J.:—

This is an appeal by the *Midland Railway Company*, the Plaintiffs, against a decision of Mr. Justice *Chitty* who refused to grant them an injunction to restrain the Defendant from working minerals under their line. I say "minerals," and I will deal with the question of what is meant by that word afterwards.

The Defendant is owner of land through which a considerable portion, about a mile and a half—the exact mileage is immaterial—of the railway passes, and the railway company took land from him for the purpose of constructing that portion of their railway. Under that portion of the line and adjoining the line there are both ironstone and limestone, and we know that under the 77th and following sections of the *Railways Clauses Act* it has been established that the railway company, having regard to those sections, when they give notice to buy land, do not buy any right of support from minerals under the surface. If they want to get them they may get them, but they are not bound to get them. Then under the provisions of these sections of the Act, if the owner is desirous of working he is not to have his minerals taken away and the right of working them taken away without compensation being given under the 6th section of the Act, and under the provisions of the 78th and 79th sections.

There are some points, and some important points, which have already been decided as regards the effect of those sections. It has been decided that the railway company is not bound to give their notice under sect. 78 of their desire or intention to

(1) Law Rep. 2 H. L. 27. (2) 3 App. Cas. 165.
(3) 22 Ch. D. 25.

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purchase within thirty days. They may give that at any time. They may postpone their intention of purchasing on the owner giving notice of his intention to work until the support which would be taken away by working becomes to them a practical question. That is very important, because if they were bound within the thirty days once for all to make up their minds as to whether they would buy or not, questions would arise which, in my opinion, do not arise here. Also as far as I can see, if they think it advisable (but I am far from saying it would be in this case), they may give notice to the landowner to buy one plot at one time and another plot at another time, that is to say, to buy the minerals in that portion which there is an immediate danger of his working, and they must afterwards, when he is coming near to work another portion, give another notice of their intention to buy that.

As regards the possibility of giving notice at any time, that is settled; but then we come to a great deal that is unsettled. The question raised here was this: was there any intention or desire on the part of the Defendant to work the mines within the meaning of this section, and had he the right to express such a desire? That question turns upon this. It is said that no one but an owner, lessee, or occupier who is intending to work personally, that is to say, by his servants and those who are merely acting for him, could give such a notice, and that an owner of minerals who is not desirous of working as his own speculation, but desirous of having the mine worked by a lessee, cannot give such a notice. I think a great part of the argument in this case turns upon that, but in my opinion that contention of the railway company is wrong. What are the words here? "If the owner, lessee or occupier of any mines or minerals lying under the railway . . . . or within forty yards therefrom be desirous of working the same, such owner, lessee or occupier shall give to the company notice in writing of his intention so to do." There is nothing in my opinion there to restrict an owner from giving a notice unless he intends by his own servants and his own agents to work it. If he intends to do it in the way which is usually adopted by owners by letting it to lessees who will work, rendering him a royalty or rent, in my opinion he is a person who, being deprived of that

right and deprived of that mode of employing his land, would be entitled to compensation under sect. 6, and comes within the terms of this clause as an owner who is desirous of working. To hold the contrary would very largely prejudice owners of mines under or near a railway, because a man cannot make arrangements for letting a mine unless he is able to assure those who are offering to take, that they can work it if they take a lease; but if he does not know whether the railway company will exercise their right or whether they will allow it to be worked by him or his lessees, it is impossible for him to enter into any arrangement with persons who are willing to work and to lay out, as is very often necessary, a large sum of money in order to enable them to work profitably the minerals of which they are lessees. In my opinion that contention cannot prevail. Although I doubt whether if the notice means personally working, that is to say, by his servants, we could hold that the Defendant was desirous of working, yet as he had a right to give the notice of his desire to work by means of lessees, in my opinion, on the evidence it is clearly established that he was desirous of doing so, and that there was a strong probability of his being able to let it, even at the time when he gave this notice. I quite agree that there must be not only an expression of desire but an honest actual existence of the desire to work either by himself or his lessees to justify an owner in giving such a notice. If he gave the notice when it was obvious either that there were no minerals, or that he could not possibly intend either to let them or work them himself, that would be vexatious, and the Court would not allow that to be acted upon. If it was acted upon it is very true the railway company might be put to some expense in arbitrations, unless they made an offer of rather more than nothing, which is probably what the arbitrator would give if there were no minerals or no possibility of working them. In my opinion, therefore, if it appeared that the notice was a mere vexatious one, that would not be a notice of a desire to work within the meaning of this section.

Then it is said that this does not apply to limestone or ironstone, which according to the ordinary course of working would be properly worked by quarrying. That is to say, that these

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sections do not except or apply to anything which can be properly worked according to the practice of the country by open quarrying. I cannot accede to that. It is really not a question as to whether anyone would open a quarry underneath the railway, because I do not suppose any directors of any railway company would be so unwise as not to give notice that they intended to buy that which could be properly worked by open quarrying; it must stop their railway, and that is a matter to be provided for, if that which can be worked properly by open quarrying is within these sections. Of course, they have this advantage. They do not give anything for support from minerals, but if there is an intention and desire on the part of the owner to work and to get compensation for that which he is deprived of if he is not to have the power to work, they do at once exercise the right given them by the Act of Parliament, and take at a price which would be the subject of arbitration that which the owner is desirous of working. But let us look at the words of the 77th section: "The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them." Slate,' as a rule, is worked by open quarrying, and when one looks at that and considers how very often the word "mines" is not used strictly as indicating a working by means of underground cutting only, I think here the meaning is that the notice is to apply to all seams or veins of what is there referred to—coal, ironstone, slate, or other minerals—which are in strata under the surface occupied by the railway. It may come up to the surface, and then it may be said that that portion which is actually on the surface is used for the purpose of the railway, and that would be comprised within their purchase. In my opinion those words, although the word "mines" is not used in a very strict and proper sense as regards working, are used here not to designate the mode of working but that which is in seams or strata so as to be worked, whether by mines properly so called or by quarrying. Sect. 80 deals with there being strata under the line of railway when no mine is being worked under the railway. There it gives to the landowner power if he is working his minerals, in carrying on his mining operations to make mines and openings under the line of railway; but that

points to my mind to this, that the word "mines" is an inaccurate expression for minerals in strata, and does not define or restrict the mode of working to that mode of working which is properly called "mining" as distinct from quarrying. Therefore, in my opinion, that contention will not prevail.

Then it is said that this notice is a great deal too large. In this case the extent seems to be about a mile and a half. I give no opinion as to what would be the result if the owner of twenty miles of land through which the railway went gave a general notice of this sort. It may be that the Court would come to the conclusion that there was not an honest actual intention of working those minerals. But in an ordinary case all difficulty is got rid of, in this way, that where the railway company know the owner is intending to work any particular portion of that which is included in his notice, they can at once, although the thirty days may have elapsed, give him a counter-notice and say they are going to purchase the minerals in that portion. But in the present case, where they know well from the bore-holes where there are minerals and where there are not, it would be the most unwise thing in the world for the company to divide the land comprised in the notice, and say, we give you a counter-notice as between *A.* and *B.*, but we leave the rest, though you may afterwards find out something there which you will intend to work. It would be much better for them to deal with the matter and to have the expense of one arbitration, with the possibility that they may have made an offer that will quite satisfy the arbitrator that they have offered more than enough. In my opinion that objection cannot prevail, and I cannot suppose it possible that the landowner would, without the railway company knowing something about it, proceed to open a mine under the railway where those who did so, if they did it carelessly, might possibly render themselves subject to an indictment for manslaughter, if there was a fatal accident. And if they did that in a place where it was obvious there could be no minerals—no ironstone or limestone—which could be worked, in my opinion a Court of Equity would very properly hold that what they were doing was not in pursuance of an honest desire to work, but was merely done maliciously in order to embarrass the railway company. If the Court

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came to that conclusion, the Court would be right in granting an injunction to restrain interference with the railway, not for the purpose of working, but for the mere purpose of embarrassing the railway company. In my opinion this appeal fails.

LINDLEY, L.J. :—

The notice served by Sir *Frederick Robinson* on the 25th of January, 1886, states, as such notices are required to state, that there are mines under the railway and that he is desirous of working them. The railway company have given no counter-notice, but they contend that Sir *Frederick Robinson* is not entitled to proceed under that notice. In other words, they say that he is not in a position to give the notice, or that if he is in a position to give it, at all events he is giving it, not *bonâ fide* because he intends to work the mines under the railway, but because he simply intends, if he can, to force the company to compensate him for mines which it is not worth his while to work.

The questions which have been raised are important, undoubtedly. The first point to consider is the position of the parties. What are the real facts? The real facts, as I understand them, are these—that Sir *Frederick Robinson* is, in point of fact, the owner of minerals under this railway, and that there are minerals there. There is no controversy at all about that. Whether they can be worked at a profit or not is more or less in dispute, but as to some part there seems to be no controversy even about that. He is in fact, the owner. He has not let the minerals which are in question, and he has not granted to any occupier or other person a license to get them. He is the owner of them, and he is personally in the position of having a present right to work them if he chooses.

The next point, which is important as a matter of fact, is this. It appears that a great portion of the lands comprised in Sir *F. Robinson's* notice on both sides of the line has been leased to the *Staveley Colliery Company*, and he is not therefore in possession of the ironstone on each side of the line, but, on the other hand, he has, as I understand it, rights of access across or through the lands demised to the minerals to which I have alluded under the railway.

That being the position of affairs, and the presence of minerals not being open to doubt, the question is what is the effect of this notice? Now, I allude first of all to Sir *Arthur Watson's* argument that the ironstone in this part of the county is usually got by quarrying as distinguished from mining, and that Sir *Frederick Robinson* is not entitled to give notice, inasmuch as sect. 77, and the subsequent sections, do not apply to quarries or to minerals usually got by quarrying. The point has not arisen now for the first time by any means. It has been more or less discussed and alluded to for many years, and it is admitted that there is one decision before Mr. Justice *Kay* (*Midland Railway Company* v. *Haunchwood Brick and Tile Company* (1)), in which it was held that the construction contended for by Sir *Arthur Watson* was inaccurate. It is said that that point is now before the House of Lords. If so, I am sorry we have not got the decision of the House of Lords to guide us, but in the absence of that guide we must do the best we can upon the language of the Act and the authorities as they stand.

It appears to me that there are indications which shew that that argument is untenable, and in particular I refer to and rely upon the express mention of slate in sect. 77. Without knowing much about mining or quarrying, it is common knowledge that slate, at all events, is got as often by quarrying as by mining; and when we find slate in connection with the other words, it does appear to me that the view which has been taken hitherto of this section, that is to say, that it extends to minerals which may be got either by open quarrying or subterranean mining, is the correct view and that Sir *Arthur Watson's* contention is untenable.

The next point is whether Sir *Frederick Robinson's* notice is objectionable on the ground that he had no intention to work the mines. His position I have described. It is said that he had no intention to work them himself. I cannot find any words in sect. 78 which require that the owner should work them himself. It is admitted that he is not bound to work them with his own hands and feet. The contention is that he is to work them by his servants or agents as distinguished from lessees or licensees. I see no reason for so holding. There being no lease

(1) 20 Ch. D. 552.

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and no license to get the minerals, he is the only person at present interested in them, and one way in which a person desirous of working mines can do so is by letting them if he can, or by granting licenses as distinguished from a lease of the mines. Any mode by which he can make the minerals productive to himself appears to me to be warranted by the clause in question. Mr. *Rigby's* argument to the effect that the owner cannot give notice unless he intends to work the mines himself as contradistinguished from working by lessees or licensees, appears to me to be too narrow, and not to be warranted by the language of the section.

Then it is said that if the notice is upheld we should be putting a construction upon the Act which would expose railways to dangers never contemplated, and that we should be enabling landowners to give general notices, which would be excessively embarrassing. I was struck with this contention, but if examined it will be found incorrect. Let me suppose this case: that a landowner, when the railway company gives him notice to take his land, or soon afterwards, gives a general roving notice to the railway company of his intention to work the minerals. What is the position of the railway company? They may disregard the notice. If they think it is frivolous they need not do anything. They have power of inspecting; they have power of ascertaining what it is desirable to do for the protection of their own interests. If they come to the conclusion that the notice is seriously meant and that the landowner really does intend to work the minerals, and that there are minerals to work, they can give him a counter-notice, and if you look at the words "any part thereof" in sects. 78 and 79 it appears to me to be tolerably plain that the railway company can limit their counter-notice, if so disposed, to a portion only of the minerals referred to. Of course the consequence of that is that if they do limit their counter-notice, the landowner, who has served a more general notice, can force them to give another notice if he is in a position really to work the minerals; but the railway company can judge of their own interests about that.

Then it is said that if we put this construction upon the language of these sections it will be competent for the landowner

to give a general notice and do nothing, let thirty days go by, and then at any time thereafter suddenly come down and work the mines. It appears to me there is an obvious answer to that. If any landowner did act in that way, which is highly unreasonable, he would find himself in this position; he would be exposed to the risk of being told he never had had any *bonâ fide* intention of working, and his notice was bad *ab initio*, and he would be exposed to the risk of being told that whether his notice was good or not in the first instance, he had abandoned it. I cannot conceive that a landowner can abuse his rights to the extent I am now supposing, and that there can be no remedy on the part of the railway company.

When we come to look at the facts and the evidence in this case it appears to me on the question of fact that Mr. Justice *Chitty* has taken a view which we cannot possibly depart from. He has come to the conclusion upon the evidence, and having heard the cross-examination of the witnesses, that Sir *Frederick Robinson* when he gave notice *bonâ fide* intended to work; and I think he did. Of course he foresaw that if he was in a position to do so the railway company would not let him, but they would be forced to give a counter-notice and compensate him; but it appears to me that if the railway company were to stand upon their strict rights and decline to compensate him, he was in a position to work these minerals—they were there to be worked, and he could do it. It appears to me, therefore, that he is in this controversy in the right, and that the remedy, and the only remedy, in this particular case for the railway company is to give the counter-notice, and proceed under the Act to give him such compensation as he may be entitled to. I think the appeal ought to be dismissed.

LOPES, L.J.:—

This case raises very important questions under the *Railways Clauses Act*, 1845, sect. 77, and the following sections with regard to working mines. It is to be observed that sect. 6 must be read with these sections. It is said that these sections do not apply to ironstone and limestone or any minerals obtained by open quarrying. In my opinion that contention cannot be maintained.

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I think the word "minerals" as used in these sections applies to minerals whether they are won by open quarrying or by underground working. If that was not so, any minerals won by open quarrying would pass by the conveyance to the company, and therefore would have to be compensated for in the first instance, a thing which we know never happens.

Now with regard to sect. 77, that section provides that minerals are not to pass by the conveyance to the company except such as are necessarily dug up in the construction of the line, which are expressly provided for. In my opinion the true construction of this section and the following sections, is this. I think that the provision that the minerals are not to pass by the conveyance to the company is a provision in favour of the company, namely a provision that the company is not to be compelled in the first instance to enter into a difficult and long question as to the existence or value of minerals which may not exist at all, or if they do exist may not be capable of being commercially worked, and shews an intention that the company shall be entitled to the adjacent and subjacent support afforded by the minerals until the owner shall give a notice of his desire to work the minerals. Sect. 78, however, provides that the owner may if desirous to work the minerals give a thirty days' notice that he desires to work them. I take it that means a *bonâ fide* desire, and not merely a capricious desire, without any reasonable grounds for believing that minerals exist. The company on receiving this notice, if they apprehend danger to their railway, may give a counter-notice of their willingness to compensate; and then the company has it in its own power at any moment to secure the support afforded by these minerals to their railway. I think that is the fair construction of those sections. Upon this counter-notice being given the parties can go to arbitration or go before a jury, and I do not see that the company are prejudiced by this; because, if there are no minerals, or if the minerals are not commercially workable, then the owner will obtain no compensation. Moreover, if the company make a reasonable offer in respect of the minerals, and that offer is not exceeded; the owner will have to pay all the costs incurred by him in going before an arbitrator or going before a jury.

That is how the matter stands; but then in this case it is said that there is no *bonâ fide* desire on the part of Sir *Frederick Robinson* to work these minerals. I have already said that I think a *bonâ fide* desire in the way I have suggested must exist. It is said that the expression "owner who is desirous of working the minerals" must refer to an owner who intends to work them by his own enterprise, and not to an owner who intends to work them by means of granting a license, a set, or a lease, which are the usual modes by which owners realize their minerals. I cannot adopt that contention. It appears to me that the owner is entitled either to work them himself if he thinks fit, as a private enterprise of his own, or he is entitled to let them to others, and to obtain from those others a royalty, and thereby to realize the value of his minerals.

With respect to the *bonâ fide* intention of Sir *Frederick Robinson* the evidence appears to me to be strong. He himself says that he has such *bonâ fide* intention. Mr. *Birch*, the mineral agent, is called, and he gives evidence which goes strongly in that direction. But what strikes me as being most important as indicating a *bonâ fide* intention on the part of Sir *Frederick Robinson* to work these minerals is this. Beyond all question valuable minerals exist on this property, and the existence of valuable minerals underneath this land at any rate raises a strong presumption that it is not an unreasonable thing on the part of the man who owns such minerals to desire to work them.

It was also suggested that the notice was too large, that the land in question extended for nearly two miles, and that the notice therefore was an embarrassing notice to the company. I do not myself see that difficulty, because in the first place I think that it is open to the company when they give their counter-notice to confine it to any such portions of the land in the extent of two miles as they think fit. Then if they desire, they might go to arbitration or to a jury to assess the value of the minerals, with respect to that particular area. No doubt they would be exposed to this, that the owner if he thought fit might commence operations in other parts of the line, but I do not see any great danger to be apprehended from that. It is suggested that a certain number of workmen might come down surreptitiously and

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suddenly let down the line. In the first place people cannot come upon the line in the way suggested without being observed, and in the next place I think that if anything of that kind were done the persons who did it, if any persons were killed, would expose themselves to an indictment for manslaughter; and over and above that I think the company might at once come to the Court, and the Court would interfere and prevent such proceedings.

On these grounds I am of opinion that the decision of Mr. Justice *Chitty* was right, and that his decision should be affirmed.

Solicitors for Plaintiffs: *Beale & Co.*
Solicitors for Defendant: *Capel-Cure & Ball.*

W. M.

C. A. 1887 STIRLING, J. *Nov.* 18, 19. C. A. *Dec.* 20.

BIDDER *v.* BRIDGES.

[1883 B. 6583.]

Accord and Satisfaction—Cheque by Third Party for a smaller Sum—Payment of Costs without Interest by Mistake.

An action having been dismissed with costs, the Defendant's solicitor got the costs taxed, and took the Taxing Master's certificate to the Plaintiff's solicitor who gave him a cheque for the amount of the costs, and received the certificate with a receipt indorsed. After the cheque had been paid, the Defendant's solicitor discovered that the Defendant was entitled to interest on the amount of taxed costs, and applied to the Plaintiff to pay it. The Plaintiff having refused to pay the interest, the Defendant moved for an order directing the Plaintiff to attend before the proper officer and produce the certificate in order that a writ of execution might be issued for the interest:—

Held (affirming the decision of *Stirling*, J.), that the Defendant acting by his solicitor must be taken to have accepted the cheque of the Plaintiff's solicitor in full accord and satisfaction of the whole debt due from the Plaintiff, and the motion was accordingly refused.

Foakes v. *Beer* (1) distinguished.

THE action in this case was brought for the purpose of establishing certain rights of common.

The action was tried before Mr. Justice *Kay*, who gave judgment on the 27th of October, 1885, in favour of the Defendants

(1) 9 App. Cas. 605.

with costs. The Plaintiffs appealed from this judgment, and the appeal was dismissed with costs on the 2nd of August, 1886.

The costs of the judgment and the appeal were taxed, and the certificates of the Taxing Master were given on the 27th of May, 1887, from which it appeared that the amount of the taxed costs of the judgment payable to the Defendant, *H. Davis*, was £465 17*s.* 10*d.*, and of the taxed costs of the appeal, £144 7*s.* 4*d.*

Mr. *C. A. Russ* was the solicitor acting for *H. Davis* in the action, and he was prepared to file the certificates when he received a letter from Messrs. *Rooke & Sons*, the solicitors for the Plaintiffs, asking him to call on them to settle the costs, and not to put his clients to the expense of filing the certificates.

Mr. *Norris*, the managing clerk of Mr. *Russ*, accordingly called on Messrs. *Rooke & Sons*, on the 28th of May, 1887, when Mr. *F. H. Rooke* handed him a cheque for £609 5*s.* 2*d.*, being the amount of the taxed costs of the judgment and appeal, less £1, which was deducted on account of the certificates not being filed. Mr. *Norris* then signed receipts for the costs, which were indorsed upon the certificates, and he then handed over the certificates to Mr. *F. H. Rooke*. The form of the receipt on the certificate of the costs of the judgment was as follows: "Received by cheque the within-mentioned costs of £465 17*s.* 10*d.*, less 10*s.*, remitted.—*Charles A. Russ.*—*H. G. N.*" And a similar receipt was given for the costs of the appeal. The cheque was drawn by *Rooke & Sons* in favour of *C. A. Russ*, Esq., or order, and was duly paid.

Mr. *Rooke* in his affidavit stated that he objected to pay for the filing of the certificates on the ground that they had been taken out without giving notice to his firm of the final appointment to dispose of certain outstanding queries and in their absence, and also on the ground that filing the certificates was an unnecessary expense; and that he gave the cheque in full satisfaction of all *Davis's* claims against the Plaintiffs under the certificates. Mr. *Norris*, however, made a counter affidavit stating that all the queries were finally disposed of in the presence of a representative of Messrs. *Rooke & Sons*. Nothing was said at the time about interest on the costs: but on the 11th of July, 1887, Mr. *Russ* wrote a letter to Messrs. *Rooke & Sons*, in which he said: "When you handed me cheque for the amount of taxed costs you omitted

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to include interest on the respective certificates. This interest, calculated at 4 per cent. from the respective dates of the judgment and appeal, must be paid in the usual way, and I should be obliged by your procuring and handing me a cheque for £33 16*s.* 7*d.*, the amount of interest as aforesaid." Messrs. *Rooke & Sons* having declined to pay the interest claimed, Mr. *Russ* wrote to them to return the certificates in order that they might take further proceedings on them; and inclosed in their place a separate receipt for the money which had been paid. Messrs. *Rooke & Sons* refused to give up the certificates, and the Defendant *Davis* then moved before Mr. Justice *Stirling* that the Plaintiffs be ordered to file, or to attend before the proper officer of the Court, and produce to such officer the certificates of the Taxing Master of the 27th of May, 1887, for the purpose of enabling the Defendant *Davis* to issue a writ of *fi. fa.* for the interest on the costs thereby certified and due from the Plaintiffs to *Davis*.

The motion came on for hearing before Mr. Justice *Stirling* on the 18th of November, 1887.

H. Terrell, for the motion:—

It is submitted that the acceptance of the cheque, and the omission to charge the interest upon the costs owing, were not a bar to the Applicant's right to recover the interest afterwards. Payment of a judgment debt under express agreement will not prevent the judgment creditor from exercising his right to recover interest upon his debt: *Foakes* v. *Beer* (1). The payment of a lesser sum cannot be a satisfaction of a greater debt: *Pinnel's Case* (2). There was no intention on the part of the Defendant *Davis* to make a gift of the interest to the Plaintiffs. He has a right under the Rules of Supreme Court, 1883, Order LXI., rule 18, to have the certificates filed; and under Order XLII., rule 32, he is entitled to ask the Court to order that to be done, so that he may be able to issue execution for the payment of the amount to which he is entitled, and which when he gave the receipts he did not intend to abandon.

W. Pearson, Q.C., for the Plaintiffs:—

The first question is one of jurisdiction, and I submit that the

(1) 9 App. Cas. 605. (2) 5 Rep. 117 a; Co. Litt. 212 b.

Court cannot make an order upon the Plaintiffs to deliver up the documents which the Defendant *Davis* now seeks to have filed. The matter has been disposed of. The Applicant agreed to accept payment by cheque of the bills of costs, less £1, and he gave receipts upon the certificates for the sums mentioned in them, and those documents became the Plaintiffs' property. There has been a good accord and satisfaction of the debts: *Goddard* v. *O'Brien* (1). The cheque was given in satisfaction of the Applicant's claim. There is now no necessity for filing the certificates. The Applicant if he ever had any right under the Rules of Court to have them filed, by his acceptance of the cheque in full satisfaction of his claim, gave it up. The application ought to be refused, and with costs.

H. Terrell, in reply:—

The case of *Goddard* v. *O'Brien* was decided before that of *Foakes* v. *Beer* (2) in the House of Lords. Earl *Selborne* in his speech in that case said (3) in reference to *Pinnel's Case* (4), and that of *Cumber* v. *Wane* (5), that "The doctrine itself, as laid down by Sir *Edward Coke*, may have been criticised, as questionable in principle, by some persons whose opinions are entitled to respect, but it has never been judicially overruled; on the contrary I think it has always, since the sixteenth century, been accepted as law." His Lordship said (6): "All the authorities subsequent to *Cumber* v. *Wane* which were relied upon by the appellant . . . such as *Sibree* v. *Tripp* (7), *Curlewis* v. *Clark* (8), and *Goddard* v. *O'Brien*, have proceeded upon the distinction, that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability."

[STIRLING, J.:—*Pinnel's Case* involved two points, as stated by Lord *Blackburn* (9), and there is a strong body of modern authorities to shew that a negotiable instrument may be something more beneficial to the creditor than his debt.]

(1) 9 Q. B. D. 37.
(2) 9 App. Cas. 605.
(3) Ibid. 612.
(4) 5 Rep. 117 a; Co. Litt. 212 b.
(5) 1 Str. 426; 1 Sm. L. C. 8th Ed. p. 357.
(6) 9 App. Cas. 613.
(7) 15 M. & W. 23.
(8) 3 Ex. 375.
(9) 9 App. Cas. 616.

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A negotiable instrument may be, but it does not follow that a cheque given in this way, dated after the date of the certificates upon which execution could have been issued, was an accord and satisfaction of the liability to pay the costs and interest upon them. There was a judgment debt in this case, and to say that a cash payment will not be a sufficient accord and satisfaction, and that a cheque will be, is not a rational state of the law. The principle laid down in *Cumber* v. *Wane* (1) was that a payment of a lesser sum cannot be an accord and satisfaction of a larger debt, and it should be followed in this case. The cases of *Sibree* v. *Tripp* (2), *Curlewis* v. *Clark* (3), and *Goddard* v. *O'Brien* (4), which was a case of debt for goods sold and delivered, are distinguishable from the present. The decision in *Thomas* v. *Heathorn* (5) also supports the Applicant's contention. The authorities shew clearly that in a case of accord and satisfaction there must be an intention to make a new contract. Here there was no intention exhibited that the cheque should be a satisfaction of the judgment debt, which was for costs and the subsequent interest. The receipts indorsed upon the certificates were that the cheque had been received for the within-mentioned costs. They did not refer to any interest, and are not evidence of any intention to accept the cheque in accord and satisfaction, or that it was taken for costs and interest upon them, but that it was taken conditionally for payment of the costs alone. At the moment, it was not remembered that interest was payable, and clearly therefore there was no intention to accept the cheque as accord and satisfaction, and the application should be granted.

STIRLING, J.:—

This is an application of a very unusual character. The notice of motion is [His Lordship read it and continued:—] It appears that the action of *Bidder* v. *Bridges* was dismissed by Mr. Justice *Kay* with costs to be paid to all the Defendants, including *Henry Davis*. The decision was affirmed by the Court of Appeal, and again the Plaintiffs were ordered to pay the costs.

(1) 1 Str. 426; 1 Sm. L. C. 8th Ed. p. 357.
(2) 15 M. & W. 23.
(3) 3 Ex. 375.
(4) 9 Q. B. D. 37.
(5) 2 B. & C. 477.

The costs have been taxed in pursuance of the orders. What has taken place since is in evidence in the affidavit of the clerk of the solicitor who acted for the Defendant *Davis*, and who had the conduct of the taxation. It is to the effect that the costs were duly taxed at £465 17*s.* 10*d.*, and £144 7*s.* 4*d.*, making together £610 5*s.* 2*d.* [His Lordship read the letters which passed between the solicitors in May, 1887, and continued:—] Upon the affidavits there is to a certain extent a conflict of evidence. Possibly, in one view, that conflict may be immaterial, but if there should be further litigation it may be material. It is plain, however, that there was a discussion about the amount to be paid. The solicitor for the Plaintiffs insisted upon a reduction of £1 being made in reference to the filing of the certificates—it having been agreed that they should not be filed; and he also insisted that the clerk of the Defendant's solicitor should take his cheque for the reduced amount; and to my mind, as the matter then stood, the meaning of both parties was that if the cheque should be honoured it was to be taken in payment for the bills of costs. That is not in dispute, whatever may be the legal effect of the transaction. The cheque was honoured. It has the indorsement of the Defendant's solicitor upon it. Then according to the evidence of that solicitor's clerk he discovered a week or two afterwards that the interest had been omitted to be charged. That is an incorrect statement, because when he went to the Plaintiffs' solicitors' office he knew that the interest was not included in the amount to be paid. What he did discover was a decision of the Court of Appeal shewing that the Defendant might claim interest; and hence this motion.

In the first place it was contended that I have no jurisdiction to make the order asked for. I do not think it necessary to go into that question, but I am not prepared to say that in a proper case I have not jurisdiction. If I found that one solicitor had by fraud or trickery got from another a document which ought to be filed, and if by its not being filed he might be deprived of his just rights, I would try to see whether it could not be placed upon the files of the Court; but that is not this case. This was a perfectly plain, honest, and honourable transaction upon both sides. In regard to it the Plaintiffs have obtained an advantage

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honourably got, and why should I take it away from them? It is plain that the certificates were not to be filed, and as plain that it was competent to the parties to enter into such an arrangement; if any mistake was made, it was a mistake of law, and therefore I do not see why the advantage gained should be taken from the Plaintiffs. The agreement being clear that the certificates should not be filed, I do not think that I ought to interfere. If there be any other remedy open to the Defendant he can pursue it. Possibly that is enough to dispose of the motion. If, however, there be jurisdiction, and I am to exercise it, I must be clear that the law is in favour of the Applicant. The object in view is to have the certificates filed so that the Applicant may immediately afterwards proceed to obtain the interest. The dispute between the parties in regard to the cheque being given, is shewn in the evidence, which is oath against oath and nothing more, and all that I could do, if I made an order, would be to put the matter in such a position as that the Defendant should obtain a decision upon the conflict of evidence, but why should I put the Plaintiffs, who have got an advantage, to a disadvantage, to which they ought not to be exposed? After the arguments I may be justified in seeing whether the authorities are in favour of the Applicant. What was done by the Applicant? He accepted, as it appears to me, in full satisfaction of the Plaintiffs' liability for costs, the cheque of their solicitors payable to order, and that cheque was duly honoured. What in law is the effect of that? The state of the law is very peculiar in regard to the acceptance of a smaller sum in satisfaction of a larger debt. The law has been recently discussed in the case of *Foakes* v. *Beer* (1), the head-note of which states that "an agreement between judgment debtor and creditor, that in consideration of the debtor paying down part of the judgment debt and costs and on condition of his paying to the creditor or his nominee the residue by instalments the creditor will not take any proceedings on the judgment, is *nudum pactum*, being without consideration, and does not prevent the creditor after payment of the whole and costs from proceeding to enforce payment of the interest upon the judgment." That decision was founded upon the doctrine

(1) 9 App. Cas. 605.

laid down so long ago as *Pinnel's Case* (1), and it will be sufficient for my purpose here if I refer to what Lord *Blackburn* said in his speech as to that case (2): "That was an action on a bond for £16 conditioned for the payment of £8 10*s.* on the 11th of November, 1600. Plea that defendant, at plaintiff's request, before the said day, to wit, on the 1st of October, paid to the plaintiff £5 2*s.* 2*d.* which the plaintiff accepted in full satisfaction of the £8 10*s.* The plaintiff had judgment for the insufficient pleading," and his Lordship went on to state that Lord *Coke* reports that the Court resolved "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole . . . . but the gift of a horse, hawk, or robe, &c., in satisfaction is good, for it shall be intended that" either "might be more beneficial to the plaintiff than the money;" and after referring further to that case Lord *Blackburn* said: "There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the Court will not inquire into the adequacy of the consideration." And secondly, "that payment of a lesser sum on the day cannot be any satisfaction of the whole." There were, therefore, two resolutions in *Pinnel's Case*, and the decision of the House of Lords affirmed the second; but, as I understand that decision, it did not in any way disaffirm the other. Therefore the first resolution referred to by Lord *Blackburn* is just as much binding on me as the second. Then comes the question here — is a negotiable instrument such a matter as may be "paid and accepted in satisfaction of a debt certain?" The Applicant accepted not a negotiable instrument of his debtors, but that of their solicitors. He took the cheque of different persons. Was that an accord and satisfaction according to the authorities? No doubt the case of *Cumber* v. *Wane* (3) was one in reference to a promissory note. In *Foakes* v. *Beer* (4) the record of *Cumber* v. *Wane* is fully stated at page 619. The decision was that giving a promissory note for £5 cannot be pleaded as a satisfaction for £15, but this has been

(1) 5 Rep. 117 a; Co. Litt. 212 b.
(2) 9 App. Cas. 615.
(3) 1 Str. 426; 1 Sm. L. C. 8th Ed. p. 357.
(4) 9 App. Cas. 605.

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denied by a series of authorities to be law. Thus in *Sibree* v. *Tripp* (1) it was held that a promissory note taken for a less sum than the demand was a good satisfaction—that a negotiable instrument for a smaller sum may be given in satisfaction of a larger debt. Then there is the case of *Curlewis* v. *Clark* (2), and also that of *Goddard* v. *O'Brien* (3), which goes even further than I am required to go in this case. It was contended that these three authorities went upon the view that *Cumber* v. *Wane* (4) was bad law, and that this was inconsistent with the decision in *Foakes* v. *Beer* (5). I do not, however, understand the House of Lords to approve of the application made in *Cumber* v. *Wane* of the doctrine laid down in *Pinnel's Case* (6). In that case there was a qualification added that if a thing of a different kind be given that is a good satisfaction. That qualification was disregarded in *Cumber* v. *Wane*; and in *Foakes* v. *Beer* this circumstance is commented upon by both Earl *Selborne* and Lord *Blackburn*. If further authority is required I may refer to the notes of the late Mr. Justice *Willes* and of Mr. Justice *Keating* to the case of *Cumber* v. *Wane* in *Smith's* Leading Cases, where they state the law to be that a demand may be discharged by payment of a thing different from that contracted to be paid though of less pecuniary value, and they give as an instance a negotiable instrument binding the debtor or a third person to pay a smaller sum. Under these circumstances, having regard to the current of authorities, which appear to me to be unaffected by the decision of the House of Lords, I hold that the cheque of a third party given as this cheque was, was a satisfaction of the debt and was a good payment. Therefore, both as to the form and upon the merits, the application fails and must be refused with costs.

T. F. M.

C. A.

From this decision the Defendant *Davis* appealed. The appeal was heard on the 20th of December, 1887.

H. Terrell, for the Appellant:—

There was no accord and satisfaction in this case. There can

(1) 15 M. & W. 23.
(2) 3 Ex. 375.
(3) 9 Q. B. D. 37.
(4) 1 Str. 426; 1 Sm. L. C. 8th Ed. p. 357.
(5) 9 App. Cas. 605.
(6) 5 Rep. 117 a; Co. Litt. 212 b.

be no accord and satisfaction where the parties had no intention to settle the whole debt at the time of the payment. The evidence shews there was no such intention here, for Mr. *Russ* had made no demand for interest, and nothing was said about interest. There was, therefore, no accord between the parties on the subject, all that they meant to settle was the principal sum due for costs.

But we also rely upon the well-known rule of law, that payment of a smaller sum cannot be pleaded in satisfaction of a larger debt: *Pinnel's Case* (1); *Cumber* v. *Wane* (2); *Foakes* v. *Beer* (3); *Thomas* v. *Heathorn* (4). It is true that in *Sibree* v. *Tripp* (5) *Curlewis* v. *Clark* (6), and *Goddard* v. *O'Brien* (7), it has been held that a negotiable instrument for a smaller sum may be taken in discharge of the whole debt; but that only applies to negotiable instruments by a third party. Here the cheque was drawn by Mr. *Rooke*, who was really the agent of the Plaintiffs. It could form no consideration for an agreement to accept a smaller sum. No case goes as far as this, except *Goddard* v. *O'Brien*, which was decided before *Foakes* v. *Beer*, and is inconsistent with it.

W. Pearson, Q.C., and *Bray*, for the Plaintiffs, were not called on.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *Stirling*, who refused the application now brought before us again on appeal. The application itself is of a somewhat curious character, though I will not myself rely on the particular terms of it. It is asking that a gentleman to whom the Appellant has delivered up certificates of the Taxing Master, should be ordered to produce them in order that the Appellant may make them effectual against the clients of the solicitor, who were the Plaintiffs in the action, in order to get interest on his costs.

It appears that there was an order made for the Plaintiffs to pay the costs. There were two certificates of the Master, one for

(1) 5 Rep. 117 a.
(2) 1 Str. 426.
(3) 9 App. Cas. 605.
(4) 2 B. & C. 477.
(5) 15 M. & W. 23.
(6) 3 Ex. 375.
(7) 9 Q. B. D. 37.

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the costs in the Court below, the other for the costs in the Court of Appeal, and when the certificates were obtained, but before they were filed, the solicitor acting for the Plaintiffs very reasonably wrote and sent to the solicitor of the Defendant a letter asking him not to incur the expense of filing the certificates; and I think also he made some suggestion that he might dispute the amount for which the costs were to be taxed. However, the Defendant's solicitor called on him, and then the Plaintiffs' solicitor paid him with his own cheque the amount of each of the certificates, less 10*s*. It is said by the Defendant that that 10*s*. was taken off in order to remove the item for filing the certificate. Whether that is so or not is immaterial. The sum was taken off, and on the cheque being handed over by the Plaintiffs' solicitor, the Defendant's solicitor handed over to the Plaintiffs' solicitor those two certificates with receipts indorsed on them.

Now what we have to consider is this, what was the agreement entered into on that occasion? and, secondly, was there any consideration for it? Now, in my opinion, the agreement is clear. It is very true that the indorsement upon the certificates is in this form: "Received by cheque the within mentioned costs, £609 5*s*. 2*d*., less 10*s*. remitted." The amount of course being different on the two certificates. What was the meaning of that? It was not necessary that the agreement should be in writing. The meaning was that the Defendant's solicitor should give up all his claim, whatever it was, under those certificates on receiving from the Plaintiffs' solicitor the cheque for the amount mentioned in the two certificates. It is said he never intended to give up any interest. I quite believe he did not know anything about interest then, or think that he was entitled to it; but if, in fact, he was entitled to interest on these certificates at the date of the judgment, and gave up all his claim under the certificates, then, in my opinion, he gave up, if there was good consideration, all those matters which he could, without anything further, obtain on those certificates, even though he did not know the law which would give him interest. Of course ignorance of general law will not excuse any man when he enters into an agreement.

But it is said that our decision to that effect would be a con-

tradiction of *Foakes* v. *Beer* (1). If so, that is a decision of the House of Lords, and we must follow it, though I must say for myself that where the House of Lords has come to a particular construction on an instrument, I should not feel myself bound to follow their decision by putting a construction on a different instrument which I did not think the correct construction of that instrument. We must follow of course the rules which they lay down in order to decide what is to be the principle of construction. All that Earl *Selborne* decided there (and none of the other Lords who delivered their opinions differed from it) was that, looking at the words of the agreement, which was reduced into writing in that case, one could only take it as an agreement to receive the sum of money and the instalments therein mentioned, in consideration of the principal sum which was due, and nothing more; and that to give it a different construction would be to add to that written agreement, which apparently fully expressed the intention of the parties, words which were not there, namely, "interest on those sums." That is an entirely different matter. What is the agreement between the parties as shewn by their acts? In my opinion the agreement was here to give up all claim in respect to the matters mentioned in the certificates, that is, in respect of those certificates.

But then we come to another point which was entered into very fully by Mr. Justice *Stirling*. Was there a consideration? Now I think the law is generally reasonable, but whether *Cumber* v. *Wane* (2) was reasonable we have not to consider. There is a qualification of the rule there laid down, by Judges (whose decisions we ought not to disregard here) by making exceptions which will reduce that case to something like principle. They lay down this—that though the payment of a smaller sum cannot be a good consideration for accord and satisfaction of a claim for a larger one, yet if there is anything which can be a new consideration and a new benefit to the person entitled to the larger sum, that will do; and the only thing we have to consider is whether here in this case there was anything which could be a new consideration, that is some new and different benefit to the person entitled to the larger sum of money. Those cases which

(1) 9 App. Cas. 605. (2) 1 Str. 426.

C. A. 1887 BIDDER v. BRIDGES. Cotton, L.J.

I have mentioned go particularly to this—that if there is a promissory note, a negotiable instrument, for a smaller sum, that may do. The first of those cases relied upon on this point goes to this—that even if it is a promissory note signed by the person who is liable for the larger sum that will do. But here that is not the case. Here the solicitor himself gives his cheque for this amount. It is very true he was paying it on behalf of his client, but not paying it so as to make his act in signing that cheque the act of his client. He gave the cheque and became personally responsible for it, though, undoubtedly, he had a right of indemnity as against his client to be paid by him whatever he might pay on that promissory note. That being so, in my opinion, having regard to the cases which have qualified *Cumber* v. *Wane* (1), and not inconsistently with *Foakes* v. *Beer* (2), we are justified in holding that there was sufficient consideration for the agreement between the solicitor of the Defendant and the solicitor of the Plaintiffs to support the contract to which I have referred. In my opinion the appeal fails.

LINDLEY, L.J. :—

I am of the same opinion. The application to the Court is that the Court may order the Plaintiffs to produce to a proper officer of the Royal Courts certain certificates of the Taxing Master for the purpose of enabling the Appellant to issue a writ of execution or *fi. fa.* When you come to look at the substance of the thing it is rather curious. The action of *Bidder* v. *Bridges* having been dismissed with costs, Mr. *Davis*, who was one of the Defendants, was entitled to receive his costs, and the costs were taxed, and on the 28th of May, 1887, Mr. *Davis's* solicitor met the Plaintiffs' solicitor, and then the Plaintiffs' solicitor gave Mr. *Davis's* solicitor a cheque for Mr. *Davis's* costs, and upon that occasion it was agreed that the certificates should not be filed. There was some little expense about it which it was wished to avoid.

We are asked to undo that transaction, and to compel the Plaintiffs' solicitor, who has got these certificates under that arrangement, to produce them, in order that further steps may be taken upon them, and that interest may be obtained. What

(1) 1 Str. 426. (2) 9 App. Cas. 605.

legal ground is there for interfering at all? In other words, upon what principle should the Court order the Plaintiffs' solicitor to produce these documents? He has got them fairly and properly pursuant to an agreement. There has been no fraud, no trick, no concealment, nor anything of the kind. When you come to sift it, the ground must be reduced to this—that Mr. *Russ* forgot all about the interest. Is that enough? Is not that precisely relying upon a mistake in law for further relief where there is no equitable element as distinguished from legal? Looking at the matter in that way it seems to me there is no ground in point of law for this application at all. I am not going to spend time in discussing *Pinnel's Case* (1), and *Cumber* v. *Wane* (2), and that class of case. It appears to me that, for the reasons given by Lord Justice *Cotton*, we are outside those cases, and I have looked at the matter apart from all technicalities. It strikes me this is an attempt without any sufficient ground to undo a *bonâ fide* settlement, and I think the appeal ought to be dismissed with costs.

LOPES, L.J.:—

I take it the law is quite clear that the payment of a smaller sum cannot be pleaded as accord and satisfaction to a claim for a larger sum; it is only a payment *pro tanto*. In *Cumber* v. *Wane* it was laid down that giving a promissory note for £5 could not be pleaded as accord and satisfaction where the claim was for a debt of £15, but that decision was modified by the case of *Sibree* v. *Tripp* (3), where it was held that a negotiable security may operate, if so given and taken, in satisfaction of a debt of greater amount; the circumstance of negotiability making it, in fact, a different thing and more advantageous than the original debt which was not negotiable.

Now it is also law that the giving of a negotiable instrument for a smaller sum by a third party would support accord and satisfaction. The principle which runs through all the cases is this, that there is a possibility of a benefit accruing to the creditor which is the consideration, for the relinquishment of the residue of the debt.

(1) 5 Rep. 117 a. (2) 1 Str. 426. (3) 15 M. & W. 23.

C. A. 1887 BIDDER v. BRIDGES. Lopes, L.J.

Now, applying that principle to the present case, I think here that the certificates were given up, and the cheque taken upon an understanding that all other claim was relinquished and given up. We must look at the intention of the parties at the time. According to my view, that was their then intention. In point of fact, they neither of them thought of the interest, and they intended at that time that what was then done should put an end to all the claims arising from that judgment. It so happens that since that a case has been decided which has brought to the attention of the Applicant here that he might have claimed interest on his costs: but he cannot now turn round and make that claim. I think the decision of Mr. Justice *Stirling* was quite right.

Solicitors: *A. E. Williams & Co.; Rooke & Sons.*

M. W.

C. A. 1887 NORTH, J. *Dec.* 2. C. A. 1888 *Jan.* 25.

PORTER *v.* PORTER.

[1887 P. 2270.]

Practice—Parties—Partition Act, 1868 (31 & 32 *Vict. c.* 40) *s.* 4 [*Revised Ed. Statutes, vol. xv., p.* 696]—*Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 6 [*Revised Ed. Statutes, vol. xviii., p.* 14]—*Person of Unsound Mind not so found—Next Friend.*

A partition action may be brought by a person of unsound mind, not so found, by a next friend.

Order of *North*, J., affirmed.

Halfhide v. *Robinson* (1) distinguished.

Where, therefore, an action for sale under the *Partition Acts* was brought by two tenants in common, one of whom, being stated to be of weak mind, sued by the other as his next friend, the Court being of opinion that an action in this form being *primâ facie* for his benefit could be maintained, refused to strike out his name as co-Plaintiff; but intimated an opinion that, at the trial, his request for sale by his next friend, assuming that the next friend could effectually make a request, could not be acted upon in the same way as a request by a person not under disability, without the Court being satisfied that the sale would be for his benefit.

THIS action was brought by *Edward Endymion Porter*, and *Wm. H. Porter* (a person of weak mind, by the said *Edward*

(1) Law Rep. 9 Ch. 373.

Endymion Porter, his brother and next friend) against *Florence Susanna Porter*.

The statement of claim set forth an indenture of settlement under which the lands, the subject of this action, stood limited (subject originally to life interests which had expired) to the use of the children of Mr. and Mrs. *Porter* as tenants in common in fee. It then stated that there were six children only of the marriage, viz. two sons, the Plaintiff *E. E. Porter*, the Plaintiff *W. H. Porter* "(who is of weak mind and unable to manage his affairs or attend to business)," and four daughters, of whom the Defendant *Florence Susannah Porter* was one, and that all had attained the age of twenty-one. That the lands belonged to the six children in equal shares. It was then alleged that, owing to the nature of the property, the number of persons entitled, and other circumstances, a sale would be more beneficial than a partition. The Plaintiffs claimed (1) that it might be declared that a sale would be more beneficial than a partition and that a sale might be ordered; (2) an inquiry what lands were subject to the uses of the settlement and who were the persons interested therein, and, if necessary, that their respective estates and interests might be declared; (3) that all proper persons might be directed to convey to the purchasers; (4) that the costs might be provided for; (5) further relief.

A motion was made on behalf of the Defendant and the Plaintiff, *Wm. H. Porter*, that the name of *Wm. H. Porter* should be struck out as Plaintiff, and that the allegation that he was of weak mind and unable to manage his affairs or attend to business might be struck out as being unnecessary, scandalous, or irrelevant.

The motion was heard before Mr. Justice *North* on the 2nd of December, 1887.

Cookson, Q.C., and *Rawlins*, for the motion:—

It was decided by Lords Justices *James* and *Mellish* in *Halfhide* v. *Robinson* (1), that an action cannot be brought by a next friend in the name of a person of unsound mind, not so found by inquisition, in respect of his real estate.

(1) Law Rep. 9 Ch. 373.

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Cozens-Hardy, Q.C., and *Morshead*, for the Plaintiffs :—

The case of *Halfhide* v. *Robinson* (1) has been overruled by the *Partition Act*, 1876, sect. 6, as has been decided by Vice-Chancellor *Malins* in *Watt* v. *Leach* (2).

Cookson, in reply :—

The terms of the 6th section of the *Partition Act*, 1876, are satisfied without making it imply that an action can be brought by a person of unsound mind not so found, and the authority conferred by that section on a next friend to make "request for sale" or give "an undertaking to purchase" on behalf of a person of unsound mind is not applicable to cases where the person of unsound mind is plaintiff; there is nothing in the terms of the enactment inconsistent with *Halfhide* v. *Robinson*. The decision of Vice-Chancellor *Malins* in *Watt* v. *Leach* has never been recognised, and is wrong on principle.

NORTH, J. :—

In my opinion the present application fails. It is based simply and solely upon the case of *Halfhide* v. *Robinson*, and if that case correctly represented the present state of the law the motion would be right. But since that case was decided, the *Partition Act*, 1876, has been passed, and the 6th section of that Act is expressed in terms which Vice-Chancellor *Malins* decided to be applicable in a partition action that was precisely similar to the present. In that case there was more than one plaintiff, and one was of unsound mind, not so found, suing by a next friend; it was there held that as far as partition actions are concerned the case of *Halfhide* v. *Robinson* was no longer law, because of that section. That case was decided eleven years ago. I know of no case in conflict with it. I have no reason to doubt that it has been followed ever since, whenever a state of circumstances arose that made it applicable. I am invited to say that the decision of Vice-Chancellor *Malins* was wrong. I cannot do that. It is exactly in point, and I should not be paying proper respect to the decision of the Court if I were to decide in opposition to it.

D. P.

(1) Law Rep. 9 Ch. 373. (2) 26 W. R. 475.

The Applicants appealed from this decision, and the appeal was heard on the 25th of January, 1888.

Cookson-Crackanthorpe, Q.C., and *Rawlins*, for the appeal:—

Halfhide v. *Robinson* (1) decided in 1874, lays down that an action could not then be brought by a person of unsound mind by his next friend for dealing with his real estate. This action therefore cannot go on. Mr. Justice *North* considered that the *Partition Act*, 1876, altered the case, and that *Halfhide* v. *Robinson* did not apply. We submit that this view is erroneous. The *Partition Act*, 1868 (31 & 32 Vict. c. 40), gave the Court jurisdiction to order a sale in a partition suit. Sect. 3 dealt with requests to sell, upon which various points arose calling for decision. The *Partition Act*, 1876 (39 & 40 Vict. c. 17), sect. 6, provided definitely how requests by persons under disability might be made (2). That section assumes that there is a properly constituted action. It would be a singular conclusion to hold that this section by a side wind authorized a form of action which previously was not allowable. The General Orders of 1875, Order XVIII., left suing by a next friend precisely where it was before, and it is giving a strong effect to the Act of 1876 to hold that it authorized a person so to sue who could not do so before.

[COTTON, L.J.:—It may be a question whether sect. 6 of the Act of 1876 ought not to be read distributively, and whether it contemplates a person of unsound mind suing by a next friend.]

The General Orders of 1883, Order XVI., rules 16, 17, refer back to the old practice of the Chancery Division, which was the same as that of the Court of Chancery, as is shewn by the Rules of 1875.

[COTTON, L.J.:—I think that the Act of 1876, sect. 6, must be construed as recognising the request of a next friend for a person of unsound mind.]

(1) Law Rep. 9 Ch. 373.

(2) "In an action for partition a request for sale may be made, or an undertaking to purchase given, on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability, but the Court shall not be bound to comply with any such request or undertaking on the part of an infant, unless it appear that the sale or purchase will be for his benefit."

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At all events he must be next friend in an action which can regularly be brought by a next friend.

[COTTON, L.J.:—Cannot an action which is for the benefit of a person of unsound mind be brought by a next friend though it relates to real estate? I am not aware of anything but the observations in *Halfhide* v. *Robinson* (1) to shew that it cannot.]

The observations there are very strong, and in the present case the interference with the property of the person of unsound mind is as forcible as there, for the sale would effect a complete conversion: *Wallace* v. *Greenwood* (2).

[*Cozens-Hardy*, Q.C.:—We dispute that: *In re Barker* (3).]

Mr. Justice *North* relied on the decision of Vice-Chancellor *Malins* in *Watt* v. *Leach* (4), with which *Platt* v. *Platt* (5), by the same Judge, is hardly consistent. In *Rimington* v. *Hartley* (6), *Jessel*, M.R. declined to follow *Platt* v. *Platt*, and held that the request might be made by a next friend or guardian *ad litem* of infants. "Authorized to act" can hardly include a person who acts of his own free will without receiving authority from any one. In every other case mentioned in sect. 6, there is some safeguard. In the case of an infant the Court has to be satisfied that the request is for the infant's benefit, in the case of a lunatic the committee must be authorized by the Court in Lunacy—as to a married woman she selects her own next friend—but, as observed by the Master of the Rolls in *Wallace* v. *Greenwood* (7), no check is imposed in the case of a person of unsound mind. It would open the door to great mischief if a person acting as next friend without any authority from any one can exercise a power like this.

[BOWEN, L.J.:—Do you say that no action relating to real estate can be brought by a next friend on behalf of a person of unsound mind? If any can, what actions are excluded?]

It cannot be contended that none can be so brought. If a trespasser were doing irremediable damage there would be a failure

(1) Law Rep. 9 Ch. 373.
(2) 16 Ch. D. 362.
(3) 17 Ch. D. 241.
(4) 26 W. R. 475.
(5) 28 W. R. 533.
(6) 14 Ch. D. 630.
(7) 16 Ch. D. 366.

of justice if no action could be brought till a committee in lunacy was appointed. But it would be dangerous to attempt to define what actions may be so brought. They ought to be actions which are *primâ facie* for the benefit of the person of unsound mind, and which do not change the character of the property. Here the action seeks a sale not a partition, and the nature of the property will be changed.

Cozens-Hardy, Q.C., and *Jason Smith*, *contrà*:—

The person of unsound mind cannot himself join in an application like this without adducing evidence that he is of sound mind, which has not been done. The appeal must therefore be treated as by the Defendant alone. The first question is whether before the *Partition Act* of 1868 a suit of this nature could be brought. There is nothing to shew that it could not, and the observations of *Jessel*, M.R., in *Jones* v. *Lloyd* (1) strongly support the view that it could. The statute 31 Hen. 8, c. 1, gave a power of partition among joint tenants and tenants in common in fee, reciting the inconveniences under which joint tenants and tenants in common lay. This was extended to joint tenants and tenants in common for life or years by 32 Hen. 8, c. 32; and the Act 8 & 9 Will. 3, c. 31, was passed for facilitating the proceedings. The writs under these statutes have since been abolished, having become obsolete in consequence of the Chancery procedure being more convenient—but they amount to a declaration by the Legislature that *primâ facie* a partition is for the benefit of the parties interested. We say, then, that a partition suit by a next friend, being *primâ facie* for the benefit of the person of unsound mind, can be maintained. *Halfhide* v. *Robinson* (2) does not decide the point against us. The application there was to carry into effect a sale of the share of the person of unsound mind to another part owner, and the Lords Justices thought that could not properly be done. If we had a right to file a partition bill in this form before 1868, that Act did not take it away, though the proceedings might result in a sale. Under sect. 8 of the Act of 1868 the proceeds would remain realty. But supposing we are wrong under the old practice, the Act of 1876, sect. 6, authorizing

(1) Law Rep. 18 Eq. 265, 273, 274. (2) Law Rep. 9 Ch. 373.

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consent by a next friend, sanctions such a suit. "Authorized to act" means "authorized to act in the action:" *Wallace* v. *Greenwood* (1). It may be a question whether the Court can sell on our request without some further authority, but that question does not arise at the present stage.

Cookson-Crackanthorpe, in reply.

COTTON, L.J.:—

This is an appeal from a decision of Mr. Justice *North*, declining to accede to a motion made on behalf of the Defendant to strike out the name of one of the Plaintiffs who is a person described as of unsound mind, and to strike out consequentially certain passages in the statement of claim. In my opinion the question does not now arise what the Court ought to do at the trial of the action, whether it ought without inquiry to treat as sufficient an assent to a sale, or request for a sale, given or made on behalf of the person of unsound mind by his next friend. In my opinion, the Act of 1868, s. 4, does not make it imperative on the Court to direct a sale where such a majority as there mentioned desires it, but only says that the Court shall order a sale unless it sees good reason to the contrary. I think that, without deciding that the next friend of a person of unsound mind is not the person to make the request, it is not a matter of course that the Court, where the majority is obtained under circumstances like those of the present case, will direct a sale without considering what is for the benefit of the person of unsound mind. To act upon such a consent without inquiry would enable a person who took upon himself the position of next friend to obtain a sale without there being anything to satisfy the Court (as is necessary in the case of a lunatic with a committee) that the sale is for the benefit of the person of unsound mind. The Court, I think, may say, "Although there is the request which the next friend is authorized to give, I shall not order a sale unless it is shewn to be for the benefit of the lunatic. The Act says, I shall direct a sale unless I see good reason to the contrary, and until the sale is shewn to be for the lunatic's benefit I do see good reason to

(1) 16 Ch. D. 362, 365.

the contrary." But, as I have said, that question does not yet arise. The case to be made out by the Defendant who moves must be, that before the Act of 1868 such an action could not be brought by a next friend on behalf of a person of unsound mind, and I do not think that such was the law.

What is the principle on which the Court allows a person of unsound mind to sue by a next friend? Where the person is incapable of acting for himself the Court allows any one of the Queen's subjects to take proceedings on his behalf as regards that which is *primâ facie* for his benefit. In my opinion, a partition is *primâ facie* for the benefit of a holder of an undivided share. That was recognised by the Act of *Henry* VIII., giving the right of partition, and although that Act of Parliament has gone, yet an action for partition is merely obtaining in a different way the benefit intended to be given without action by that statute to all persons who were tenants in common. I think, therefore, that *primâ facie* an action for partition is for the benefit of the person who is of unsound mind and who holds an undivided share in the property.

Now, is it for the plaintiff bringing such an action to shew that it is really and actually in the particular case for his benefit? I think not. It is for those who suggest that the action is not duly constituted to shew that it cannot be really for the benefit of the person of unsound mind. I do not say what would be required to justify the Court in coming to that conclusion, but that I think is what a person who objects to the use of the name of a person of unsound mind as plaintiff ought to make out, in order to induce the Court to say that if the person of unsound mind is the only plaintiff the action must not go on, or that if he is one of several plaintiffs his name must be struck out.

Now, do the Acts of Parliament make any difference? I do not think that they do. The Acts enable the Court in a suit for partition to direct a sale. That being so, it does not make the action an improper one that the plaintiff alleges that a sale will be more beneficial than a partition, and then asks the Court for a sale. The action, which is *primâ facie* for his benefit, does not become improper because he asks for something which he may not be able to get.

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No doubt the case of *Halfhide* v. *Robinson* (1) causes a difficulty, but Lord Justice *James* does not lay down that there can be no bill filed for partition by a person of unsound mind by his next friend. He only asks the question: Is there any authority for it? I asked the question once or twice whether there was any authority one way or the other, but no authority could be produced. The difficult question is whether we are not bound by what was said by Lord Justice *James* at the end of his judgment: "I wish it to be understood that a bill cannot be filed by a next friend on behalf of a person of unsound mind not so found by inquisition, for dealing with his real estate. The consequences of such a course might be monstrous." I think to a considerable extent the difficulty is obviated by the 6th section of the Act of 1876, which recognises the fact that as regards the property of persons of unsound mind, the guardian *ad litem*, and possibly also the next friend, has authority to make a request for the sale of the property. That seems to shew that without applying in Lunacy there may be a sale directed of the real estate of a person of unsound mind. I think that what the Lord Justice *James* meant was in substance this: "There is a mode given by the Legislature under the *Lunacy Regulation Act*, 1862, which enables the sale to be made in a different way, and that is the proper course to be taken, it is improper that a bill should be filed for a sale in order to avoid adopting the course to be taken under the *Lunacy Regulation Acts*." The case came before Lord Justice *James* in a very peculiar way, as was pointed out by Mr. *Cozens-Hardy*. The Court was not asked to carry out an order for sale made in a partition action. Apparently the application was not under any of the provisions of the Act, it was a petition presented in the suit, not for carrying the decree into effect, but for vesting the share of the person who was of unsound mind in one of the other parties to the action. Taking the judgment of the Lord Justice *James* reasonably, I think he only meant that the course taken was not the proper course, but that there should be a petition to the Lords Justices under the *Lunacy Regulation Act*, 1862, and then the Court might make the order. If I had felt that the Lord Justice *James* had really decided the point which

(1) Law Rep. 9 Ch. 373, 375.

we have now to decide, such respect is due to his opinion that I should not give the judgment which I have given, but my opinion is that which I have stated, and I do not think that *Halfhide* v. *Robinson* (1) ought to prevent me from acting upon it.

The application ought to have been by the Defendant alone, but as it is refused it is not necessary to amend it.

BOWEN, L.J.:—

The application made by Mr. *Cookson-Crackanthorpe* is at this early stage to take the name of the supposed person of unsound mind suing by his next friend off the proceedings, on the broad ground that an action for partition cannot be brought by a next friend on behalf of a person who is of unsound mind not so found by inquisition, and that as a person of unsound mind cannot by his next friend bring such an action himself, so he cannot be joined as a plaintiff asking for the same thing in another shape. Mr. *Cookson-Crackanthorpe* says that before the Act of 1868 no such action for partition could be brought, and that there is nothing in the Acts to alter that law—that the Acts properly interpreted do not create a cause of action, and do not entitle the next friend to sue where he could not have sued before. The strength of this argument rests upon the *dictum* of Lord Justice *James*, which apparently was assented to by Lord Justice *Mellish*, in *Halfhide* v. *Robinson* (2), where Lord Justice *James* is reported as saying: "I wish it to be understood that a bill cannot be filed by a next friend on behalf of a person of unsound mind not so found by inquisition, for dealing with his real estate." Before dismissing that case, and seeing whether we are bound by it or not, or to what extent it is a binding authority, I should like to examine the proposition in order to see on what principle it can rest. Why, in the first place, should it be confined to real property; and secondly, what is the true ground upon which a next friend is allowed to ask for the intervention of the Court on behalf of a person of unsound mind not so found by inquisition? It seems to me to be this, as was said in substance in *Beall* v. *Smith* (3) and *Jones* v. *Lloyd* (4), that when there is a person of unsound mind, who

(1) Law Rep. 9 Ch. 373.
(2) Ibid. 375.
(3) Law Rep. 9 Ch. 85.
(4) Ibid. 18 Eq. 265.

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although not found to be of unsound mind by inquisition nevertheless stands in need of the protection or the intervention of the Court as regards his property real or personal, or as regards any portion of his property—then, supposing he would if sane be entitled to the intervention of the Court, a third person, a stranger, may come forward and do that which is clearly for the benefit of the person of weak mind. That that is the ground for suing by a next friend is shewn by the judgment in *Jones* v. *Lloyd* (1), if it were not otherwise clear. In that case a bill was filed for a dissolution of partnership which alleged a dissolution to be for the benefit of the person who was of unsound mind, and on demurrer the Master of the Rolls held that the allegation was sufficient to justify the bill, and therefore overruled the demurrer. He cited with approval the language of Lord Justice *James* in *Beall* v. *Smith* (2). Now what sort of limit ought to be put on that rule? It is obvious that, in the absence of the principal person who is concerned, his property ought to be left as far as possible, and so far as his interest does not render the opposite thing necessary to be done—in the condition in which it was, *quieta non movere*. But still if it is for his protection and for his obvious benefit then the Court ought to interfere to give him, while his senses are sleeping, the same sort of protection to which he would be entitled if his senses were awake, and he could act for himself.

We have to apply that kind of consideration to an action for partition. A partition, as we all know, has for some centuries been recognised as being generally a benefit to persons who share property with others. When an action for partition is brought, it certainly may be for the benefit of the person who is of unsound mind, and it is *primâ facie* to be presumed to be so. The question is, are we to stop it on the threshold and *in initio* on the mere suggestion that it is not an action which can possibly be for the protection of the person of unsound mind. I am disposed to think that the Court, before making a decree dealing with a person's property at the instance of a plaintiff who is also the next friend, ought to be satisfied that it is interfering for the benefit or for the protection of the person who is of

(1) Law Rep. 18 Eq. 265. (2) Law Rep. 9 Ch. 85, 91.

unsound mind, and that would be a matter about which before anything effectual is done in the litigation the Court must make up its mind, but that is a point to be considered at the trial.

Then I come back to the question ought the case to be stopped *in limine?* If the Appellants' counsel could have shewn that this was an abuse of the process of the Court, and that the partition action was one which was not *bonâ fide* for the benefit of the lunatic, then even at this early stage the Court might have done what is asked. But there is before us no evidence whatever to justify us in supposing that this action will not be for the benefit of the person of unsound mind. If he turns out to be of unsound mind at the trial that will be a matter to be considered before the Court can make an order at the instance of a stranger affecting his property. The Lord Justice I believe agrees with me in that. The Court ought to be satisfied, so to speak, of the title of the next friend to intervene, and it ought to be satisfied that the person is of unsound mind and that he stands in need of protection as regards his property, and it ought to be shewn that it would be for his true interest that the Court should exercise its jurisdiction. It is not necessary to decide as a matter of strict law upon whom the onus rests of shewing that a partition is for the benefit of the estate of the person who is of unsound mind. When the case comes on for trial the question of onus and matters of that sort will have faded into unimportance and the Court will sift the whole thing and consider it.

I therefore answer the first question put by Mr. *Cookson-Crackanthorpe* in his argument in this way. I say I can see nothing in reason to prevent an action for partition being maintained when it is for the benefit of the alleged lunatic that it should be so maintained by a next friend or a stranger before the Act of 1876, and that this is not the moment at which, nor have we the materials on which, to decide that this action is not *bonâ fide* brought with a view to the lunatic's benefit.

Then if that is so what we have to consider is really not whether the Act of 1876, sect. 6, creates this right (that was Mr. *Cookson-Crackanthorpe's* second point), but we have only to see that it does not destroy it. I can see nothing in the section that prevents an action for partition being brought in any case

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where it could be brought before that Act was passed. I abstain from giving an opinion upon the construction of sect. 6, not because I have not a view upon the subject, but because this is not the time for expressing it. We abstain from giving opinions before the proper time comes. It will remain for serious consideration hereafter in what way, if at all, sect. 6 enables a request to be made by a next friend, or whether it does enable a request to be made, and whether the Court is bound to attend to it if it be made.

Having now dealt with the case upon general principle, I have only a word to say with reference to the authority, *Halfhide* v. *Robinson* (1). I entirely concur in the view which Lord Justice *Cotton* has taken of that case. It seems to me to be distinguishable on the ground which has been stated. I do not fail to observe that in that particular case the person who was of unsound mind and sued by his next friend, was the sole plaintiff, and the history of the case and what took place in the course of the litigation was no doubt the pivot on which the reasoning in the mind of the Lord Justice *James* turned.

Solicitors for Applicants: *Bolton, Robbins, Busk, & Co.*, agents for *Jones & Forrester, Malmesbury.*

Solicitors for Plaintiffs: *Tylee & Co.*

(1) Law Rep. 9 Ch. 373.

H. C. J.

In re JOHNSON AND WEATHERALL.

[1887 J. 8.]

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NORTH, J.
Nov. 26;
Dec. 3, 8.
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Feb. 1.

Solicitor — Costs — Taxation — Country Solicitor and London Agent — Bill of Agency Charges—Taxation of Part of Bill—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37 [*Revised Ed. Statutes, vol. ix. p.* 128].

London agents delivered to a country solicitor their bill of agency charges for a year. The bill included their charges relating to a number of distinct actions and matters in which they had acted as agents for the solicitor. The charges relating to each distinct action or matter were made out separately, under the head of that action or matter, though the whole of the charges were comprised in one bill:—

Held, by *North*, J., that the bill thus delivered was one bill, and that the country solicitor was not entitled to have the charges relating to one of the actions taxed without having the whole bill taxed.

Held, on appeal, that, notwithstanding sect. 37 of the *Solicitors Act*, the Court under its general jurisdiction can order taxation of part of a bill, and that in this case it was right that such jurisdiction should be exercised, but only upon terms which would prevent any injustice being done. Taxation of the charges relating to the one action was therefore ordered, upon the Appellants giving an undertaking to pay within a short limited time (subject to an undertaking to refund) the balance claimed by the agents to be due to them for charges and disbursements, and the Appellants, who had not previously offered any undertaking, were ordered to pay the costs of the appeal.

SUMMONS by Messrs. *Storer & Co.*, solicitors at *Manchester*, asking that the bill of fees, charges, and disbursements in an action, *Mellor* v. *Swire*, delivered on the 4th of January, 1886, to the Applicants by Messrs. *Johnson & Weatherall*, solicitors in *London*, might be referred to the Taxing Master to be taxed, the Applicants disputing retainer and liability in respect of certain proceedings taken in *Mellor* v. *Swire;* and that the Master should tax the costs of the reference and certify what should be due to or from either party in respect of the bill and costs of the reference, to be charged (if payable) according to the event of the taxation pursuant to the statute; and that, upon payment by the Applicants of what (if anything) might appear to be due to *Johnson & Weatherall*, the latter might deliver up to the Applicants, or as they might direct, all deeds, papers, and writings

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in their possession, custody, or power belonging to the Applicants.

Johnson & Weatherall had for some years acted as the *London* agents of *Storer & Co.* It was their practice to deliver to *Storer & Co.* at the end of each year a bill of their agency charges for that year in respect of the various matters in which they had acted as agents for *Storer & Co.* The charges relating to each distinct action or matter were stated separately under the head of that action or matter, so that the whole bill was made up of a series of bills, the charges relating to each distinct action or matter forming (so to say) a separate chapter in the bill. On the 4th of January, 1886, *Johnson & Weatherall* delivered to *Storer & Co.* their bill of agency charges down to the end of the year 1885. The bill extended over 165 pages, and included the agency charges relating to a number of distinct actions and matters in which *Johnson & Weatherall* had acted as the *London* agents of *Storer & Co.* during the year 1885, the bill being made out in the manner above described. One of the actions was *Mellor* v. *Swire*, and the charges relating to that action extended over pages 85 to 149 inclusive of the bill. The summons was directed to that part only of the bill which related to *Mellor* v. *Swire*. The summons was issued on the 3rd of January, 1887.

Another bill containing later charges in *Mellor* v. *Swire* had been delivered on the 22nd of September, 1886.

By their affidavits in support of the summons the Applicants alleged that many of the charges made in *Mellor* v. *Swire* were improper, because they represented the costs of proceedings taken in that action which were rendered necessary by reason of the negligence and want of skill of the Respondents in the conduct of that action. The Respondents denied the allegations of negligence and want of skill, and they said that the Applicants were not entitled to have the charges relating to *Mellor* v. *Swire* taxed separately, but that they could only have an order for the taxation of the whole bill delivered. The amount claimed by the agents to be due to them for charges and disbursements was £1188 1*s.* 4*d.*

The summons came on for hearing before Mr. Justice *North* on the 26th of November, 1887.

Cookson, Q.C., and *Levett*, for the Applicants:—

The action of *Mellor* v. *Swire* is a totally separate and independent matter from the other matters the costs of which are comprised in the same annual bill. There is no connection between it and the other matters, except the common bond of agency. There is really a separate bill of costs as to each of the matters, though they are all put together in one book, of which each forms a distinct chapter. Why should we, because we wish to challenge certain items in one bill, be compelled to tax a number of other independent bills? When sect. 37 of the *Solicitors Act* of 1843 speaks of referring "such bill" for taxation, it does not necessarily mean the whole bill, and nothing but the bill, which has been delivered. The employment of the agent is a separate employment in each distinct matter, and, if distinct matters can be mixed up in this way, grave injustice might be inflicted by an unscrupulous agent on a country solicitor. The charges in one particular matter might be excessive, and yet the country solicitor might have to pay the costs of taxation, because, by reason of the accuracy of the charges in the other matters, less than one-sixth of the whole bill had been struck off on taxation. The lay client would be entitled, as against the country solicitor, to have the costs relating to each separate matter taxed separately, and the *London* agent could not object to a taxation of the costs of an action on further consideration, because there were other agency costs of other distinct matters due to him by the country solicitor. Orders have been made for the taxation of parts of bills of costs: *Scougall* v. *Campbell* (1); *In re Tryon* (2).

A special order such as we ask may be made under "special circumstances." One "special circumstance" is, that the bill is an agency bill, and another is, that the *London* agents have been guilty of gross negligence in their conduct of the proceedings in *Mellor* v. *Swire*: *In re Massey and Carey* (3).

Hamilton Humphreys (*Cozens-Hardy*, Q.C., with him), for the *London* agents:—

In re Massey and Carey shews that, under the common order

(1) 3 Russ. 545.
(2) *Seton* on Decrees, 4th Ed. vol. i. p. 606.
(3) 26 Ch. D. 459.

C. A. 1888 *In re* JOHNSON AND WEATHERALL.

to tax, the Taxing Master has power to go into the question of negligence on the part of the solicitor. Inasmuch as the period of twelve months from the delivery of the bill had not elapsed when the summons was issued, the common order to tax could have been obtained, and the provisions of the Act as to "special circumstances" have no application.

This bill is in the form which is commonly, if not universally, used by *London* agents for a bill of agency charges against a country solicitor. There is no authority for an order to tax particular items of a bill. The cases cited were very special. We have offered to have the whole bill taxed. We deny the allegation of negligence. There is no precedent for the application.

Cookson, in reply:—

A taxation between a *London* agent and a country solicitor stands on the same footing as a taxation between a solicitor and his client: *In re Nelson, Son, & Hastings* (1).

1887. Dec. 8. NORTH, J.:—

This is a summons by Messrs. *Storer & Co.*, solicitors at *Manchester*, for the taxation of a part of a bill delivered to them by their *London* agents, Messrs. *Johnson & Weatherall*. The bill is a general bill of agency charges for a whole year, such bills being, I believe, according to the usual practice of *London* agents, delivered to the country solicitors once a year. The bill contains the charges in respect of a number of distinct actions or matters.

The items are not arranged chronologically, without reference to the action or matter to which they relate, but the charges relating to each suit or matter are stated separately under the head of that suit or matter.

The summons asks that the bill of charges in an action of *Mellor* v. *Swire* may be referred to be taxed. The bill was delivered on the 4th of January, 1886, and it is the general bill of the *London* agents' charges for the year 1885. The bill extends over 165 pages, of which pages 85 to 149 relate to

(1) 30 Ch. D. 1.

the charges in *Mellor* v. *Swire*. Those pages may be considered as forming one chapter in a book of bills, and the summons is addressed to the taxation of that portion only of the book. The country solicitors do not desire to have the whole bill taxed, but only that portion of it, and for this reason, that, on the taxation of that portion, they hope to succeed in striking out some items of charge of large amount, on the ground that they were incurred through the negligence of the *London* agents. The question for my decision is, whether the Applicants are entitled to have one portion only of the bill taxed, without taxing the whole bill? I think they are not. In my opinion the bill which has been delivered is one bill, and not a number of distinct bills. The employment of a *London* agent is a general employment, and the custom is for him to send in his bill to the country solicitor in this form. Soon after the *Solicitors Act* of 1843 was passed, the question was raised, whether a country solicitor could have his *London* agent's bill taxed at all, and it was decided both in the Court of Chancery and in the Courts of Common Law that he could. In *Smith* v. *Dimes* (1) Sir *F. Pollock*, C.B., who delivered the judgment of the Court, said (2): "We do not see any ground for holding, that, as an attorney in *London* is clearly employed by an attorney in the country solely because he is an attorney, he may not be bound to deliver his bill for such agency, and liable to have it taxed." And the same thing was decided in the Court of Chancery. In the recent case *In re Nelson, Son, & Hastings* (3), before Mr. Justice *Pearson* and the Court of Appeal, detailed bills of costs had been delivered by *London* agents to a country solicitor regularly every year, and sometimes oftener, for seven years. The country solicitor desired to have all those bills taxed, and it was held by Mr. Justice *Pearson* that he was only entitled to have those bills taxed which had been delivered within a year before the application for taxation was made. One ground urged on behalf of the country solicitor was, that the costs in an action of *Rhodes* v. *Jenkins*, which had been going on during the whole period, had not yet been taxed as between solicitor and client.

(1) 4 Ex. 32.

(2) 4 Ex. 40.

(3) 30 Ch. D. 1.

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The appeal was limited to the costs in *Rhodes* v. *Jenkins*, and the Court of Appeal declined to allow a taxation of the bills of costs in that action which had been delivered more than a year, holding that the country solicitor could not, at his option, treat the separate bills delivered in different years as one continuous bill. But nothing was said in the judgments of the Court of Appeal on the point which now arises, for it would have been raised in that case only if the counsel for the respondent had been called upon. I have been unable to find any reported case in which such a taxation as is now asked for has been directed. I have spoken to one of the Taxing Masters, who has had great experience as a Taxing Master, and who was formerly a partner in a firm of *London* solicitors who carried on an extensive agency business, and he tells me that he has never heard of such a thing as a taxation of a part only of a *London* agent's bill. In my opinion this bill is really one bill, though I do not forget that Mr. *Cookson* said that it consists of a series of bills fastened together in one book. Sect. 37 of the *Solicitors Act* provides for the reference to taxation of "such bill," *i.e.* the bill which has been delivered, and also provides that if a sixth part of the bill is taxed off, the solicitor shall pay the costs of the taxation, but that otherwise the costs of taxation shall be paid by the party chargeable with the bill.

Another difficulty in the way of the Applicants arises out of the form of their summons. It asks that, upon payment by the Applicants of what may be found due to the *London* agents for costs in *Mellor* v. *Swire*, the *London* agents may deliver up to the Applicants all documents in their possession belonging to the Applicants. If I were to direct the taxation of the costs relating to *Mellor* v. *Swire* only, it would be utterly impossible for me to make such an order as that. It would be absurd to say that, upon payment by the country solicitors only of what should be found due from them for costs in *Mellor* v. *Swire*, every document belonging to them, which is in the possession of the *London* agents, must be handed over to them by the *London* agents. It may be said that there is a slip in the summons, and that it was intended to ask only for the delivery up of documents relating to *Mellor* v. *Swire*, and that the summons may be amended. But

that would not remove the difficulty, because, as was held by Mr. Justice *Fry* in *Lawrence* v. *Fletcher* (1), a *London* agent has a general lien upon all documents belonging to the country solicitor which are in his possession for whatever may be due to him by the latter. It would, therefore, be impossible for me to order the delivery up of any documents, except upon payment of the whole amount due by the Applicants to the *London* agents, and the only mode of ascertaining that amount is by a taxation of the whole bill.

It is said that there is authority for the present application, and two cases have been cited. The first is *Scougall* v. *Campbell* (2). The circumstances, however, of that case were very special; it was decided before the *Solicitors Act*, and it has really no application to the present case. The other case is *In re Tryon* (3), in which an order was made in 1844 to tax, not a bill of costs, but certain specified disputed items in a bill which had been paid by the petitioners. I have looked at the report of the case (4), and from that report it appears that the petition was for the taxation of a bill of costs which had been paid. The petitioners had sold an estate of which they were trustees, and they applied to a Mr. *Curling*, to whom two terms of years had been assigned on trust to attend the inheritance of the property, to re-assign the terms to new trustees for the purchaser. This he refused to do, alleging that he had never accepted the trust, and the vendors then asked him to execute a deed of disclaimer, and he ultimately consented to do so upon an undertaking to pay his costs and expenses. The amount of his solicitor's bill of costs was objected to by the vendors, but, as the deed of disclaimer was necessary for the completion of the purchase, the bill was paid, the payment being accompanied by a letter which stated that the sum was paid under protest, and without prejudice to the right of the vendors to tax or otherwise question the bill. Lord *Langdale*, M.R., held that the payment of the bill had been conditional, and he ordered a taxation of the items complained of, and reserved the question of costs. The order did not direct a taxation of the bill, or of a part of the bill, but two particular items

(1) 12 Ch. D. 858.
(2) 3 Russ. 545.
(3) *Seton* on Decrees, 4th Ed. vol. i. p. 606.
(4) 7 Beav. 496.

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which were complained of were referred to the Taxing Master. I am not asked in the present case to deal with particular items in that way, but to refer for taxation the whole bill in *Mellor* v. *Swire*. Neither of the cases cited is an authority for such a taxation.

It is said that there are "special circumstances" which would justify me in making the order asked for, viz. the fact that the bill is a bill of "agency charges," and the fact that allegations of negligence are made against the *London* agents. In my opinion neither of these facts is a "special circumstance." It is said that it will be a great hardship on the Applicants if they are compelled to go to the Taxing Master to tax a great number of items, when only a few of them are really in dispute, and it is said that the Applicants ought not to be put to that trouble and expense. I am informed by the Taxing Master that this will really make no difference, except in the amount of the percentage which he is entitled to charge. He tells me that, if the parties desired to have part only of a bill taxed, he should look at the whole bill, and should certainly ask for vouchers for such items as fees paid to counsel, and that he might also require an explanation of special items, but that he should in other respects accept the statements of the parties. What the Taxing Master tells me satisfies me that the conclusion at which I had previously arrived was correct, viz. that a taxation of the whole bill, as compared with a taxation of only the costs in *Mellor* v. *Swire*, will cause very little extra expense. As there are no "special circumstances," and as I cannot find any case during the forty-five years which have elapsed since the passing of the Act in which such a taxation has been directed, I must decline to make the order which is asked for, even if I have power to make it. I dismiss the summons with costs.

W. L. C.

The Applicants appealed from this decision, and the appeal was heard on the 1st of February, 1888.

Cookson-Crackanthorpe, Q.C., and *Levett*, for the Appellants:—

The Judge has held that all the bills must be taxed together. We should have to pay a percentage on the whole amount, though

we do not dispute the bill except as regards charges connected with *Mellor* v. *Swire*. Before the *Solicitors Act*, 1843, the Court had jurisdiction to tax an agent's bill on the application of the solicitor who employed him: *Jones* v. *Roberts* (1); and so since the Act at Common Law: *Smith* v. *Dimes* (2); and in the Chancery Division: *In re Nelson, Son, & Hastings* (3). The client in *Mellor* v. *Swire* could have the country solicitor's bill taxed, which would be partly made up of the agent's bill, and it would be very unjust if the country solicitor could not have the agent's bill taxed without going into the whole of the account between himself and the agent. He might be liable to pay the costs on the ground that one-sixth of the whole bill was not taxed off though much more had been taxed off this part of the bill. The bill is in fact not one bill but a set of bills. Before the Act of 1843 the Court could order taxation of part of a bill: *Scougall* v. *Campbell* (4). It has been decided since the Act that this cannot be done by order of course; but it has never been decided that it cannot be done upon special application. In *In re Tryon* (5) a taxation of part of a bill was directed. An agent who makes unreasonable charges in a particular business ought not to escape because the charges in the other matters comprised in his bill are reasonable. The proviso in sect. 37 of the Act enables the Court to do full justice in regard to costs. What relates to *Mellor* v. *Swire* is really a separate bill. There is a distinction between the position of the country solicitors towards the client and of the *London* agent towards the country solicitors. The lien of the town agent on the client's papers only goes to the extent of the country solicitors' lien. If the client pays the country solicitors the papers must be given up: *Waller* v. *Holmes* (6). This shews that the bill is really a separate bill. In *Ward* v. *Eyre* (7) it is said that the *Solicitors Act*, 1843, does not apply as between *London* agent and country solicitor. If not we are thrown back on the old practice. The authority of the *London* agent is a delegated authority. Here business was done for forty-three clients; there are forty-three delegated authorities

(1) 8 Sim. 397.
(2) 4 Ex. 32.
(3) 30 Ch. D. 1.
(4) 3 Russ. 545.
(5) 7 Beav. 496; 1 *Seton* on Decrees, 4th Ed. vol. i. p. 606.
(6) 1 J. & H. 239, 242.
(7) 15 Ch. D. 130, 136.

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by forty-three separate retainers, and that in substance makes the bills separate bills. But apart from that the Court always had inherent jurisdiction to refer for taxation a part of a bill for business in an action. The costs arising from the negligence of the agent ought to be disallowed: *In re Massey and Carey* (1).

Cozens-Hardy, Q.C., and *Hamilton Humphreys*, appeared for the *London* agents.

COTTON, L.J.:—

Subject to what we may hear in argument from the Respondents' counsel, we think that the Court has jurisdiction to order a part of a bill to be referred to taxation, and that this is a case where it would be right to exercise it, but only on the terms of the Appellants undertaking to pay to the Respondents within a short limited time the cash balance claimed to be due, the Respondents undertaking to refund if necessary, and the Appellants paying the costs of the appeal. Do the Respondents wish to be heard in opposition to such an order?

Cozens-Hardy:—We do not wish to oppose an order of that kind.

COTTON, L.J.:—

We think that the Appellants were wrong in the idea that they could come under the Act for an order to tax a part of a solicitor's bill. This would be contrary to the course of practice under the Act. No undertaking was offered by them to pay what was due. They insisted as a matter of right upon having part of the bill referred for taxation without offering any terms. I do not think that the *Solicitors Act*, 1843, gives any jurisdiction to tax part of an agent's bill; but I am of opinion that the Court, under its general jurisdiction can order taxation of bills relating to Court business, whether the bill be an agent's bill or a bill delivered by a solicitor to his client, and also can refer part of a bill for taxation: *In re Tryon* (2). Lord *Langdale*, who had great experience in matters of taxation, directed taxation of part of an agency bill, reserving the costs. The Court in a proper case will exercise this

(1) 26 Ch. D. 459. (2) 1 *Seton* on Decrees, 4th Ed. vol. i. p. 606.

jurisdiction, taking care to impose such terms as will prevent any injustice being done. In the present case I think it reasonable that a taxation of so much of the bill as relates to *Mellor* v. *Swire* should be directed, but on the terms of the Applicants paying the cash balance claimed to be due, subject to an undertaking to refund in case it shall ultimately appear that the Respondents are not entitled to retain the whole of it. The rule as to the result of one-sixth being taxed off ought not to be followed; the costs will be left to be dealt with by the Court. The agents must be allowed to include in the taxation their subsequent bill relating to *Mellor* v. *Swire*.

LINDLEY, L.J.:—

I am of the same opinion. I am not disposed to construe sect. 37 as depriving the Court of its power to refer part of a bill for taxation or of any other power which it had before. I do not see anything to prevent the Court on a special case being made from referring to taxation any particular class of items in a solicitor's bill. I agree that it should be done on the terms proposed. If they are not complied with the appeal will be dismissed with costs.

BOWEN, L.J.:—

I also am of opinion that the Act does not deprive the Court of jurisdiction to refer part of a bill for taxation if circumstances make it right to do so.

The following minutes of order were handed down by the Court:—

"If within four days the Appellants undertake to pay over to the Respondents within ten days from this date (subject to an undertaking to refund) the sum of £1188 1*s.* 4*d.*, and consenting by their counsel to refer to taxation such further bills relating to *Mellor* v. *Swire* as have been delivered subsequently to the bills mentioned in the notice of appeal, Order that so much of the delivered bill as relates to *Mellor* v. *Swire* be referred to taxation. Appellants to pay costs here and below. All other costs reserved. If no such undertaking given, appeal dismissed with costs."

Solicitors for Applicants: *Rowley & Co.*, agents for *Storer & Co.*, *Manchester.*

Solicitors for Respondents: *Johnson & Weatherall.*

H. C. J.

C. A.
1887
KAY, J.
April 21.
C. A.
1888
Jan. 13.

In re TIPPETT'S AND NEWBOULD'S CONTRACT.

[1887 T. 316.]

Absolute Gift—Separate Use—Restraint on Anticipation—Vendor and Purchaser Summons.

Where a fund subject to a particular estate is given absolutely to married woman with a restraint on anticipation, the restraint will not in the absence of any other ground be confined to the continuance of that particular estate.

Decision of *Kay*, J., affirmed.

In re Bown (1) distinguished.

A married woman contracted to sell a leasehold vested in trustees for her under a will. The purchaser objected to the title on the ground that she was by the will restrained from anticipation. She took out a summons under the *Vendor and Purchaser Act*, 1874, to have the point decided. The Judge made an order under the *Conveyancing and Law of Property Act*, 1881, s. 39, binding her interest in the property, and adjourned into Court the question whether she was restrained from anticipation, directing the trustees to be served. The Court decided that she was restrained from anticipation, and that the purchase-money must not be paid to her, but to the trustees. From this she appealed :—

Held, by the Court of Appeal, that as the question whether the purchase-money was to be paid to her or the trustees did not concern the purchaser, the Court had no jurisdiction to decide it on a vendor and purchaser summons; but the Court gave the vendor leave to amend the summons so as to make it an originating summons under Order LV., rule 3, and the proper parties being before the Court, the appeal was allowed to proceed on her undertaking so to amend it.

LEONARD LLOYD by will, dated the 1st of March, 1869, bequeathed his personalty to *John Parkes* and *George Parkes* upon trust to invest the net residue, and devised his real estate and chattels real unto and to the use of *John Parkes* and *George Parkes*, their heirs, executors, administrators and assigns, upon trust to accumulate the net rents and profits thereof, along with the income of his residuary personalty, until his youngest child should attain twenty-one, and after that period he directed his trustees "to stand possessed" of his residuary personal estate and the accumulated income thereof, and of his real estates and

(1) 27 Ch. D. 411.

chattels real, and the accumulation of the rents and profits thereof "upon trust for my three children, *Annie Maud*, *Alice* and *Alexander*, share and share alike as tenants in common: provided always, and I hereby declare, that the share and interest of each of my said daughters under this my will or any codicil thereto shall be for her sole and separate use, independently of any husband and of his debts, control, and engagements, and such daughter shall not have power to dispose or deprive herself of the benefit thereof by anticipation." There was a power of allowing maintenance out of the income of expectant shares. A power was given to the trustees until the testator's youngest child should attain twenty-one to grant leases for twenty-one years in possession.

The testator died in 1877. The youngest child attained twenty-one in 1882. *Annie Maud* had married Mr. *Tippetts* and *Alice* had married *Henry Hall*. In 1883 *Alexander Lloyd* sold and assigned to *Henry Hall* his one-third share in a leasehold messuage, called *Clapton House*, being a part of the testator's chattels real.

On the 1st of May, 1885, Mrs. *Tippetts* and Mr. and Mrs. *Hall* contracted to sell *Clapton House* to *Emma Newbould*. The purchaser objected that the restraint on anticipation precluded the married ladies from selling. The vendors took out a summons under the *Vendor and Purchaser Act*, 1874, asking for a declaration that they had power to sell.

The summons came before Mr. Justice *Kay* in March, 1887, in Chambers. His Lordship was clearly of opinion that the sale was beneficial to the married ladies, and his Lordship directed that, notwithstanding the restraint on anticipation, if in force, their interests in the property should be bound for giving effect to the sale, and that the purchase-money should be paid to the trustees. As to the question whether their interests in the purchase-money were bound by a restraint on anticipation, his Lordship adjourned the summons into Court, and directed the trustees to be served, and the summons to be amended for that purpose. The summons was accordingly amended by making the trustees parties, and they were served. On the 21st of April, 1887, the summons came on in Court.

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Arthur Underhill, for the married ladies.

A. J. Allen, for the trustees.

KAY, J.:—

If the conclusion to be drawn from the will is that the testator intended a fund to be held by his trustees upon trust for a married woman for her separate use with a restraint on anticipation, effect must be given to that intention. The married ladies rely on *In re Bown* (1). But in that case there was an express direction to pay the principal to the married woman, which shews an intention that the fund should not be held by the trustees. In *In re Grey's Settlements* (2) the decision was that the restraint on anticipation was general and, but for the direction which we find here for accumulation, that case would be on all fours with the present. If there were here the same words as in *In re Bown,* I should have followed that case, but the words here are quite different, and I think the case falls within the principle of *In re Grey's Settlements.*

The order declared that the married ladies were not entitled to receive their shares of the purchase-money, but, during their covertures, were entitled to the income only without power of anticipation.

C. A. Mrs. *Tippetts* and Mrs. *Hall* appealed, and the appeal came on for hearing on the 13th of January, 1888.

Arthur Underhill, for the Appellants:—

[THE COURT held that as the question whether there was a restraint on anticipation affecting the purchase-money, was a matter with which the purchaser had no concern, the Court had no jurisdiction to decide it on a summons under the *Vendor and Purchaser Act.* Their Lordships, however, thought that leave might be given to amend the summons so as to make it an originating summons for obtaining the opinion of the Court on the construction of the will, and the trustees, who would be the

(1) 27 Ch. D. 411. (2) 34 Ch. D. 85, 712.

only persons to be served with such a summons, being before the Court, the argument was allowed to proceed on the Appellants undertaking to amend the summons as above.]

I submit that where property is left absolutely to a married woman for her separate use after the determination of a particular estate a restraint on anticipation will, *primâ facie*, be taken to apply only during the continuance of that particular estate, as in *In re Bown* (1).

[COTTON, L.J.:—In that case there was a direction to pay the *corpus* to the legatees.]

In *In re Grey's Settlements* (2) the gift was immediate, so there was no limited period to which the restraint could be confined. The fact that the leasing power ceases when the youngest child attains twenty-one shews that the trustees were not to have any active duties after that event.

A. J. Allen, for the trustees, was not called upon.

LORD COLERIDGE, L.C.J.:—

I am of opinion that the order under appeal is right. In construing a will the object is to arrive at the intention of the testator, and in considering what intention is to be gathered from his language, we must assume him to have used words in their legal sense, unless there is something in the context to shew the contrary. In the present case what we have to determine is, whether the testator meant his daughters to take shares of the capital absolutely, or whether he intended their shares of capital to be held by his trustees for them during their coverture with a restraint on their anticipating the income. Apart from authority I should have thought it clear that he intended the share of each married daughter to be held in trust for her with a restraint on anticipation. If there had been judicial decisions on words similar to those in the present will we must have given due weight to them, but there are none. Two cases were cited, but the one which was relied upon by the Appellants is quite distinguishable from the present. In that case, *In re Bown*,

(1) 27 Ch. D. 411. (2) 34 Ch. D. 85, 712.

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Lord Coleridge, C.J.

it was held that the testator intended the legatees to have the capital paid to them; but in the other case, *In re Grey's Settlements* (1), it was decided that the testator must be taken to have intended the legacies to remain in the hands of the trustees with a restraint on anticipation by the legatees. Both these decisions are, in my judgment, right, and consistent with each other. In *In re Bown* (2) there was a direction to "pay" to the legatee after the death of the tenant for life. This shewed the testator's intention to be that the shares of that legatee should then be handed over to her, and the restraint on anticipation was, therefore, held to be confined to the antecedent period. In *In re Grey's Settlements* there were no words shewing an intention that the legacies should be paid over, and the restraint on anticipation was held to be general.

COTTON, L.J.:—

I am of the same opinion. The point we have to decide is, whether this case comes within *In re Bown* or within *In re Grey's Settlements*. In each case the principle is the same. The point to be ascertained is, did the testator mean the money to be handed over to the legatee, or to be held by the trustees for her subject to a restraint on anticipation? In *In re Bown* there was a direction to pay to the legatee at the death of the tenant for life, which was inconsistent with her being restrained from anticipation after that period; and it was, therefore, held that the restraint was only intended to prevent her from dealing with her share before it came into possession. In *In re Grey's Settlements* there was no expression of intention that the shares should be paid over to the legatees, and full effect was given to the restraint on anticipation according to its terms.

BOWEN, L.J.:—

I am of the same opinion.

Solicitors for both Parties: *Thomas White & Sons*, agents for *J. Clark, Willenhall.*

(1) 34 Ch. D. 712. (2) 27 Ch. D. 411.

H. C. J.

BORTHWICK *v.* THE EVENING POST.

C. A.
1888
KAY, J.
Jan. 13, 16.
C. A.
Jan. 17, 21, 23.

[1887 B. 6278.]

Trade Name—Newspaper—Injunction—Tendency to deceive—Evidence of Damage.

Where the owner of a publication claims an injunction to restrain the issue of another publication with a similar name, he must shew not only that the assumption of the name by the defendant is calculated to deceive the public, but also that there is a probability of the plaintiff being injured by such deception.

The Plaintiff had long been the proprietor of a daily morning newspaper, called the *Morning Post*. The Defendants commenced a daily evening newspaper called the *Evening Post*. There was no evidence of any actual injury having been done to the Plaintiff by the conduct of the Defendants:—

Held (reversing the decision of *Kay*, J.), that although the conduct of the Defendants in taking the name *Evening Post* might be calculated to deceive the public into supposing that there was a connection between the two papers, there was no probability that the Plaintiff would be injured by such supposition; and an injunction was therefore refused.

THIS was an action by Sir *Algernon Borthwick*, Bart., the proprietor of the *Morning Post* newspaper, to restrain the Defendants from publishing a newspaper under the title of "*The Evening Post*," or under any other title of which the word "*Post*" formed part, so as to represent or induce the belief that the Defendants' newspaper was a late or evening edition of the *Morning Post*.

The Defendants were a joint stock company registered on the 15th December, 1887, under the name of "*The Evening Post (Limited)*." They were the owners of an old established daily paper called the *Daily Recorder*, which was formerly called the *Daily Recorder of Commerce*, and early in December, 1887, the promoters of the company commenced to advertise a new evening paper to be called "*The Evening Post*."

On the 19th of December the Plaintiff's solicitor wrote a letter to the Defendants in which he said "The attention of my clients, the proprietors of the *Morning Post*, has been called to certain advertisements, which state that you are about to issue a paper to be called the *Evening Post*. I am instructed to take proceedings forthwith to apply for an injunction to restrain you from

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bringing out a paper under that name. Before doing so however I think it courteous to you to give you the opportunity of changing the name of your paper. I must ask for an immediate answer as to whether, after this notice, you insist on using the above title."

The Defendants returned, through their solicitors, a courteous answer to this letter, but declined to alter the name of the forthcoming paper.

The first number of the *Evening Post* was published on the 21st of December. The words, "*The Evening Post*," were printed at the head of the paper in the large old English type in which the names of newspapers, including the *Morning Post*, are usually printed; and underneath, in much smaller type, were printed the words, "With which is incorporated the *Daily Recorder*." It consisted of a single sheet of four pages of six columns each; the *Morning Post* has eight pages of seven columns each. The *Evening Post* had no advertisements on the front page; the first page of the *Morning Post* consists entirely of advertisements. The price of the paper was one penny, the same as the price of the *Morning Post*. The office at which it was published was 108, *Fleet Street*; the *Morning Post* being published in *Wellington Street, Strand*.

The placards issued by the Plaintiff and Defendants were of very different appearance, those of the *Morning Post* being printed in blue ink, and those of the *Evening Post* in red.

It appeared from the affidavits that "*The Morning Post*" was established in 1772. For a period of twenty-five years the proprietors published a second edition at 1 o'clock P.M. under the same title, but which was practically an evening edition. But this was discontinued about five years ago, and a second edition was, since that time, only published when occasion required.

Mr. *Colligan*, the manager of the publishing department of the Plaintiff's paper, deposed that prior to, and shortly after, the first publication of the *Evening Post*, twelve persons called at the offices of the *Morning Post* and asked for copies of the new paper, supposing that it was published at that office; and there was also evidence that several other persons subsequently called and made similar inquiries.

The Defendants on the other hand gave evidence that the name "*Post*" had been frequently applied to newspapers both in *London* and in other parts of *England*; for instance, in 1681, the *London Post*; in 1695 the *Flying Post*; in 1697 the *Post Boy*; in 1706 the *Evening Post*; in 1719 the *Daily Post*; in 1712 the *Halfpenny Post* and the *Whitehall Evening Post*; in 1760 *Lloyd's Evening Post*. In *Liverpool*, the *Daily Post*; in *Launceston*, the *Cornish and Devon Post*; at *Leeds* the *Yorkshire Post*; at *Exeter* the *Evening Post* and the *Flying Post*.

The Plaintiff moved for an interim injunction, and the hearing of the motion was by arrangement treated as the trial of the action. The motion was heard before Mr. Justice *Kay* on the 13th of January, 1888.

Marten, Q.C., and *Begg*, for the Plaintiff, cited *Walter* v. *Emmott* (1); *Hall* v. *Barrows* (2); *Singer Manufacturing Company* v. *Loog* (3); *Clement* v. *Maddick* (4); *Croft* v. *Day* (5); *McAndrew* v. *Bassett* (6) and *Sebastian* on Trade-marks (7).

Renshaw, Q.C., and *Bryan Farrer*, for the Defendants, cited *Cowen* v. *Hulton* (8); *Hendriks* v. *Montagu* (9) and *Dicks* v. *Yates* (10).

Marten, in reply.

1888. Jan. 16. KAY, J.:—

The proprietor of the *Morning Post* seeks an injunction to restrain the Defendants from publishing in *London* a daily paper under the name of the *Evening Post*. The parties have agreed before me to treat this as the trial of the action, and not to object to the historical part of the evidence on the ground that it is merely founded on information. The important facts are that the *Morning Post* is an old-established *London* daily paper, founded in 1772. For a period of twenty-five years, up to about

(1) W. N. 1885, p. 156; 54 L. J. (Ch.) 1059.
(2) 4 D. J. & S. 150.
(3) 8 App. Cas. 15.
(4) 1 Giff. 98.
(5) 7 Beav. 84.
(6) 4 D. J. & S. 380.
(7) 2nd Ed. p. 263.
(8) 46 L. T. (N.S.) 897.
(9) 17 Ch. D. 638.
(10) 18 Ch. D. 76.

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five years ago, a second edition was published at 1 P.M. under the same title, which, it is said, was practically an evening edition. This has been done intermittently since that time by publishing second or later editions when circumstances required, and these are regularly taken by some of the subscribers. The Defendants are a limited company who have acquired the control of a paper called the *Daily Recorder*, said to have been established nearly 100 years ago as the *Daily Recorder of Commerce*. This company are publishing the newspaper complained of, which they call the *Evening Post*, adding, in smaller type under the title, "with which is incorporated the *Daily Recorder*." The advertisements of the issue of the newspaper omit this addition to the title. The printing of the name and the general typography of the paper resemble those of the *Morning Post*. The shape is the same, but the size and the number of columns of the letter-press are somewhat different. Before the first issue the Plaintiff's solicitor, on the 19th of December, 1887, wrote thus to the Defendants:— [His Lordship read the letter.] This was answered on the same day by a letter, courteous and argumentative, denying the alleged right, and intimating that any proceedings would be resisted. Thereupon this action was immediately commenced, and the question is now submitted to me for decision as at the trial.

The first point is that the Plaintiff does not suggest that anyone would mistake the Defendants' paper for the *Morning Post*. The suggestion is that it will be mistaken for an evening issue of that paper. This, it is urged, is an injury which may occasion damage to the Plaintiff. It is argued that the Plaintiff can have no control over the Defendants' paper, and that it may be so conducted as to disgust the subscribers to the Plaintiff's journal and cause them, for that reason, to cease to take it. Even if well conducted, the political and other opinions put forward in it may be repugnant to the readers of the *Morning Post*. And apart from these reasons, if mistaken for an evening issue of the *Morning Post*, persons might buy it in preference to the morning paper, and thus the Plaintiff might be damnified. I think there is considerable weight in these arguments. I have never seen the Defendants' paper except in Court, and have no reason to suppose it is not well conducted; but it is much to be regretted that the

present condition of things is such that it is easy to understand that the proprietor of a paper of the standing and reputation of the *Morning Post*, or of any of the leading *London* newspapers, may reasonably be extremely jealous of having it supposed that another publication over which he has no control is an edition of his newspaper.

There is no doubt of the jurisdiction of the Court. It has been often exercised to prevent the use of a name for a newspaper calculated to induce the belief that it was the publication of another newspaper proprietor. Examples of the exercise of such jurisdiction are *Hogg* v. *Kirby* (1), *Edmonds* v. *Benbow* (2), *Re The Edinburgh Correspondent* (3), *Prowett* v. *Mortimer* (4), and *Ingram* v. *Stiff* (5), in all of which cases injunctions were granted. Many cases have occurred in which relief was refused on the ground that what was done was not calculated to damage the plaintiff; but in none has the jurisdiction been doubted. Nor was it denied in argument that this jurisdiction might extend to a case like the present. The test is obvious. If the Defendants were to represent on the face of their newspaper, in so many words, that it was an evening issue of the *Morning Post*, that would be an invasion of the rights of property of the owner of that paper which would at once be restrained. It is the same thing if what they are doing amounts to a tacit representation of that kind. The real question is, has it in fact that effect? The jurisdiction is analogous to that exercised in cases of trade-marks, where the Court interferes whenever one tradesman is attempting to pass off his goods as those of another tradesman. This was originally supposed to rest on the ground that such a proceeding was a fraud. But in the case of *Millington* v. *Fox* (6) it was established that the jurisdiction exists where this has been innocently done. And subsequently Lord *Westbury*, in *Hall* v. *Barrows* (7), stated the real ground to be the protection of property. And in *McAndrew* v. *Bassett* (8), where the trade-mark was a single word, his Lordship held that a certain property

(1) 8 Ves. 215.
(2) Sebastian's Digest, p. 16.
(3) 1 Court Sess. Cas. 1st Series, 407, n.
(4) 2 Jur. (N.S.) 414.
(5) 5 Jur. (N.S.) 947.
(6) 3 My. & Cr. 338.
(7) 4 D. J. & S. 150.
(8) 4 D. J. & S. 380.

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exists in such a word, as applied by way of stamp on a particular vendable article, the moment that article obtains reputation whereby the stamp gets currency as an indication of superior quality, or of some other circumstance which renders the article so stamped acceptable to the public.

This view of the law has since been followed, and it is expressly recognised by Lord Justice *Mellish* in *Singer Manufacturing Company* v. *Wilson* (1) and by Lord *Blackburn* in *Singer Manufacturing Company* v. *Loog* (2) in the House of Lords. It seems to me that this doctrine applies to a case like the one before me. It may well be said that the owner of the *Morning Post* has from its position and reputation a valuable property, of the kind described by Lord *Westbury*, in the name of his newspaper. But whether he has or not is a question, in my opinion, of no practical importance. He has a valuable property in the newspaper itself. Its standing and reputation have obtained for it a large circulation. Any one who should appropriate part of that circulation by representing another paper to be owned, edited, or written by the owner, editor, or staff of the *Morning Post* would injure and damage the Plaintiff's property, and would wrongfully acquire some of that property to himself, just as a tradesman who passes off his goods as the goods of another man inflicts injury and damage on the property of that other man. That is the property which the Court interferes to protect, and it interferes by injunction because the damage, though it may be great, is scarcely capable of accurate estimation; and, as Lord *Westbury* said in *Hall* v. *Barrows* (3), the remedy by an action for damages is, therefore, not adequate.

Now, apart from any special evidence, I should come without hesitation to the conclusion that what the Defendants are doing is calculated to deceive the public by inducing them to buy the Defendants' paper as an evening issue of the *Morning Post*. This is, in my opinion, an injury which will damage the Plaintiff. But there is direct evidence that persons have been so deceived. Mr. *Colligan*, manager of the publishing department of the *Morning Post*, states in his affidavit that prior and subsequent to the issue

(1) 2 Ch. D. 434, 454. (2) 8 App. Cas. 32.
(3) 4 D. J. & S. 150.

on the 21st of December last of the Defendants' paper, applications were made by not less than twelve persons to him, or in his presence, at the publishing office of the *Morning Post*, with reference to and for copies of the *Evening Post*. All such applicants, he says, evidently considered it was connected with and issued from the same publishing office as the *Morning Post*, and was in fact an evening edition of that paper. Mr. *Dickson*, managing printer of the *Morning Post*, deposes that on the evening of the 21st of December two several persons called at the publishing office and asked him for copies of the *Evening Post*, and Mr. *Greene*, assistant reader on the staff of the *Morning Post*, states that on the same evening four persons called at the publishing office and asked him for copies of the *Evening Post*, saying that they thought it was published at the office of the *Morning Post*; and again, on the 2nd of January last, two persons called and made similar inquiries at different times. These were in addition to the inquiries made of Mr. *Dickson*.

It is not necessary to the Plaintiff's case to shew that what the Defendants have done was with the intention of passing off their paper as an edition of the Plaintiff's; but, if that be so, the case is much stronger. I confess I have the greatest difficulty in believing that the Defendants had not that intention. The paper they had acquired and were continuing was called the *Daily Recorder*, or the *Daily Recorder of Commerce*. There must have been some reason for a change of name so complete and extraordinary. The temptation to avail themselves of the reputation of a well-known *London* newspaper was great. I cannot help inferring that this was partly the reason for adopting the name of the *Evening Post*.

I must, therefore, grant a perpetual injunction restraining the Defendants, their agents and servants, from publishing, selling, or advertising for sale any newspaper by the name of the *Evening Post*, or by any other name calculated to induce the public to believe that such newspaper is an edition of the *Morning Post*, or is owned, edited, or written by the owner, editor, or staff of that newspaper. The Defendants must pay the costs of the action.

G. I. F. C.

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From this judgment the Defendants appealed. The appeal came on for hearing on the 17th of January, 1888.

Renshaw, Q.C., and *Bryan Farrer*, for the Appellants:—

There is no attempt at deception in this case, the *Evening Post* bears on its title the fact that it was connected with the *Daily Recorder of Commerce*, and it is totally different in appearance from the *Morning Post*. The evidence of the public being actually misled into supposing that it is connected in any way with the *Morning Post* is very feeble; and the mistake could never occur after the paper is once started. If any mistake should occur the Plaintiff would not be injured. No one would abstain from purchasing the *Morning Post* because of the existence of an evening newspaper, although they thought there was a connection between the papers. The Plaintiff has shewn no actual damage or probability of damage. The Plaintiff has no property in the name of "*The Post*." It has been a common name for newspapers for many years. And if it had not been, the addition of the word "*Evening*" would have prevented it from being a violation of the Plaintiff's trade name: *Walter* v. *Emmott* (1) (the case of the *Morning Mail*); *Cowen* v. *Hulton* (2) (the case of the *Sporting Chronicle*) are in point.

Marten, Q.C., and *Begg*, for the Plaintiff:—

There has been a deliberate intention on the part of the Defendants to deceive the public into the idea that the paper is connected with the *Morning Post*. The preliminary advertisements called attention to the name *Evening Post*, and when the paper was published the name of the *Daily Recorder* was in much smaller type. In the placard also there is no allusion to the *Daily Recorder*. Every one would naturally suppose that it was an evening edition of the *Morning Post*. If the Plaintiff were to issue an evening edition he would naturally call it the *Evening Post*, and the conduct of the Defendants amounts to a representation that their paper is an evening edition of the *Morning Post*. We are therefore entitled to the interference of the Court: *Hogg*

(1) 54 L. J. (Ch.) 1059; W. N. 1885, p. 156. (2) 46 L. T. (N.S.) 897.

v. *Kirby* (1); *Metzler* v. *Wood* (2); *Prowett* v. *Mortimer* (3) (the case of the *True Britannia*); *Ingram* v. *Stiff* (4) (the case of the *London Daily Journal*); *Chance* v. *Sheppard* (5) (the case of the *Bedfordshire Express*); *Edmonds* v. *Benbow* (6) (the case of the *Real John Bull*); *Clement* v. *Maddick* (7) (the case of the *Penny Bell's Life*). The evidence which we have produced shews that several actual mistakes were made by persons wishing to buy the paper: and we contend that these mistakes would be a serious injury to our paper, first by competing with its sale; and secondly, by persons attributing the opinions and management of the Defendants' paper to the *Morning Post*. But it is not necessary to prove damage or intention to deceive. We claim a property in the name "*The Post*," which we have acquired by a long period of user; and the Defendants have no right to invade that property: *Singer Manufacturing Company* v. *Wilson* (8).

Renshaw, in reply.

1888. Jan. 23. LORD COLERIDGE, L.C.J.:—

In this case we have been asked to reverse a judgment of Mr. Justice *Kay*, by which he issued an injunction to restrain the Defendants from publishing a paper under the name of the "*Evening Post*, with which is incorporated the *Daily Recorder*." The facts of the case are simple to a degree. Everybody is aware of the existence of the *Morning Post*—an old-established paper of high character—which has existed for a great many years. It seems that some years ago the proprietor of the *Morning Post* was in the habit of publishing, later in the day, sometimes as late as three in the afternoon, a second or third edition, but still always called by the name of "*The Morning Post*." It is not suggested in any of the affidavits, nor by counsel, that the Plaintiff ever did intend, or does intend, to publish a paper called "*The Evening Post*" in connection with the *Morning Post* of the same nature, and under the same authority as the *Morning Post* is published. It has not been suggested that this case comes

(1) 8 Ves. 215.
(2) 8 Ch. D. 606.
(3) 2 Jur. (N.S.) 414.
(4) 5 Jur. (N.S.) 947.
(5) Sebastian's Digest, p. 189.
(6) Ibid. p. 16.
(7) 1 Giff. 98.
(8) 3 App. Cas. 376.

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exactly within the authority of any reported case in which the very name, or a colourable imitation of the name, had been taken by the person against whom the application was made. Under such circumstances there is plenty of authority, authority founded on the soundest sense, to shew that the Court would interfere as in a matter of property. There may be property in a name as well as in anything else, and anything like an interference with property in a name would be immediately restrained by the Court. The Defendant company, towards the end of the month of December, advertised that they were about to publish a paper under the name of the *Evening Post*, and that they had incorporated with it the *Daily Recorder*, which is an old paper and had apparently a large circulation. That was the whole, except this, that several applications—no more than twenty—some before and some since the publication of the paper, have been made to the office of the *Morning Post* for copies of the *Evening Post*, shewing that those twenty persons were under the impression that there was some connection between the *Evening Post* and the *Morning Post*, and that one could be bought at the offices of the other. It is to be observed that in the advertisement of the *Evening Post* the office was stated in large type, and that the office was said to be 108, *Fleet Street*, whereas, although we have no right to say it is common knowledge, most persons who have lived in *London* for some time are aware that the *Morning Post* is published at a large house in *Wellington Street*, on the front of which house appears the name *Morning Post* in large letters. Those are the only facts in the case. But the Plaintiff does not rely on these facts alone. His case is put somewhat in this way, that the *Evening Post* is the natural name for the *Morning Post* if it issued an evening edition, and he assumes that anybody who saw the *Evening Post* advertised, if he looked at it carelessly and did not observe where it was published, or inquire where it was published, might not unnaturally come to the conclusion that it was an evening edition of the *Morning Post*, and that being so, it was issued under the authority of the *Morning Post*, and would be conducted by the same persons as the *Morning Post*, and would represent the general opinions of the *Morning Post*. And he argues that if this paper is not conducted on the same political principles as the *Morning*

Post—whether it is so or not I do not know—or if it is very inferior—as probably it would be at first—to the *Morning Post*, persons who took the evening paper under the impression that they were taking something issued by the editors or staff of the *Morning Post* would be so annoyed and displeased with what they saw in the evening paper that they would discontinue their support of the *Morning Post*, and that, therefore, the persons who had property in the *Morning Post* would be injured. All that, no doubt, is conceivable, but it seems to me that it is only conceivable; that the damage suggested is not a damage that, as far as I am aware, has ever yet been made the ground for interference on the part of this Court. But it is put, and can only be put, as I think, upon another ground, and that ground is this, that the assumption of the name of the *Evening Post* was intended by the takers of it, and might by reasonable people be supposed, to indicate a connection between the two papers, and that therefore there was an attempt upon the part of the assumers of the title of the *Evening Post* to trade under the colour of the *Morning Post*, and to take advantage of the benefits which the connection might be supposed to give to the new paper; and it was contended that as there is no such connection, and as the benefit suggested to be gained would be gained under a mistake and misapprehension induced by the Defendants, that would be a ground for the interference of this Court. I am not at all prepared to say that if it were distinctly made out, not only that such an advantage might be gained, but that there was some ground for supposing that it had been gained, this Court would not interfere and would not confirm this judgment. But what strikes me in the matter is that there is no evidence given in this case that, at least as regards the *Morning Post*, any damage has been inflicted. There have been twenty applications, and twenty only, made to the *Morning Post* for copies of the *Evening Post*. From that the Court is asked to draw the inference which I have indicated a few sentences back, and which, therefore, I will not repeat. But it is not suggested—at least there is no evidence given of any kind—that a single copy less of the *Morning Post* has been sold than would have been if the Defendants had not taken the action they have. Under those circumstances it seems to me that there is not enough in this case

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to warrant the interference of the Court by injunction, and that the judgment and order of Mr. Justice *Kay* must be reversed.

But I cannot for my own part clear my mind of a lurking suspicion that the name "*The Evening Post*" was taken because there was a *Morning Post*, and that, although the *Morning Post* has not been hurt, and perhaps the *Morning Post* never will be hurt to the extent of one penny, yet the public and the persons who buy the *Evening Post* may possibly think there is some connection with this old-established paper; and at all events I cannot quite feel certain that the assumer of the title did not wish that the public should so think. And, under those circumstances, I think there must be no costs in the case, and that the company must pay their own costs in respect of the experiment they have made, and also their own costs of the appeal.

COTTON, L.J.:—

I agree in that conclusion, and as we differ from Mr. Justice *Kay* I must state my reasons for differing from him. In his judgment and in argument a good many authorities were referred to by him and quoted to us. In my opinion, in cases like this, and especially cases arising under the circumstances before us, authorities are of no use when once we have got the true principle on which the Court ought to act. The principle very clearly appears from a case which was referred to by Mr. *Marten*, of *Hogg* v. *Kirby* (1), where the publication of a work put forward by the defendant was stopped at the instance of the plaintiff, the publisher of another work. There Lord *Eldon* says (2): "I shall state the question to be, not whether this work is the same, but .... whether the defendant has not represented it to be the same." Now I will state the case here a little more favourably for the Plaintiff, because it is not whether the Defendants have represented it to be the same, but whether the public would understand it to be, not indeed the same paper as the *Morning Post*, but a paper issued by the owners or proprietors of the *Morning Post*, and connected with the *Morning Post* in such a way as to damage or prejudice the owners of the *Morning Post*. That I think is the question we have to consider. There is this

(1) 8 Ves. 215. (2) 8 Ves. 225.

fact in this particular case which makes it differ considerably from most of the cases which have come before the Court, that these two publications cannot be called competing publications; the one is a morning paper, the other is an evening paper; and although at one time the *Morning Post* did publish later editions, it did not publish any evening paper, but only published from time to time late editions of the paper entitled "*The Morning Post*," but published later in the day, at the time when the evening papers begin to be issued. I think it could not be suggested that in consequence of the representation contained in the title *Evening Post* that paper could be understood to be in competition with, or could interfere with, the sale of the *Morning Post*. Of course if that had been the case it would have been much easier to make out that that was the object intended by the Defendants, and that there would be damage resulting from such a representation, whether intended or not intended. Because if one paper is bought for the other, there must at all events be the loss of the sale of the Plaintiff's publication to that extent. Therefore there is this circumstance to be taken into consideration, that these are not competing papers, but the Plaintiffs contend that what the Defendants have done will be understood to be a representation, even if it were not so intended, that this is an evening edition of the *Morning Post*, either an *Evening Post* issued from the offices of the *Morning Post*, or an evening paper connected with the publication of the *Morning Post*. Then, again, there is this to be considered. This is very unlike the sale of articles such as tea, or anything else where the articles are bought by the public, who take one particular word of a distinctive name, and are caught by the similarity in the type and by a similarity in the size or colour of the packages; because the representations assumed to be made will only be to those who are going to buy, who will read the paper and will not only take one hasty look at it. They will also be people who will be in a position to form an opinion upon the politics contained in the *Evening Post*. Therefore they are persons of rather more intelligence, and are not likely to be misled by the colour or imitation of name as purchasers might be of packets, such as of tea, soap, or anything else. Now the argument is this: that this

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would be the natural name for the proprietor of the *Morning Post* to take if he published an evening paper. I think that is probable, but then there is no suggestion that the Plaintiff has really intended to publish an evening paper, and one comes to the question, assuming that this paper could be understood by some persons to be connected in some way with the *Morning Post*, whether it can be said that there is any reasonable prospect of damage or injury to the *Morning Post*. It is only the name. The papers are not alike; the get-up is different, and there is nothing in my opinion, except the name of the *Evening Post*, which can be considered as a suggestion that it is connected with the *Morning Post*. In my opinion, in order to justify the Court in granting an injunction, we ought to be satisfied that there probably will be injury to the pockets of the Plaintiff. That is required in order to justify us in granting an injunction; for this is only an action for representing that the work of the Defendants is the work of the Plaintiff, or is so connected with the work of the Plaintiff as to do the Plaintiff some damage by injuring the selling of his work. It is true we are dealing with it on equitable principles in this way: that we are asked to grant an injunction, which, although Courts of Common Law now have the power of granting it, still is an equitable remedy and ought not to be granted unless the Court is satisfied that there is damage to the Plaintiff — probable damage, not necessarily damage already suffered—as the result of the Defendants' conduct. But here the only suggestion which is put forward is this—subject to one which I will mention presently— that people will be so annoyed at seeing the way in which the editor of the *Morning Post* is supposed to be conducting the evening edition of the paper that they would discontinue taking in the *Morning Post*. I do not think anybody who has read the paper would think that this was issued by the same person who prepared and issued the *Morning Post*. An ingenious suggestion was made to this effect, that any one who heard called out at a railway station, "Terrible Accident," or "Frightful foreign news," or anything of that sort, and saw the evening placard, would buy the paper because he relied upon the *Morning Post* to contain correct intelligence, and finding that the news could not be depended upon, would then give up

his *Morning Post*. But that is not a reasonable conclusion. Any one who reads the paper would at once see that it was not from the same hand. If it differed in politics, they would at once see the difference. They would not imagine that the *Morning Post* advocated one kind of politics in the morning and a different kind in the evening. As regards the news, they would see when they read the paper that it did not come from the same hand, and therefore there is no probability of damage or injury to the proprietors of the *Morning Post* by any mistakes or failures of the *Evening Post* to act as well as the *Morning Post* does for the benefit of the public. There is only a suggestion of possible injury, and I think we ought not to act on that. In order to justify us in granting an injunction we must have evidence to satisfy us that there is reasonable probability that, in fact, there will be damage to the party complaining. In my opinion, the action ought to be dismissed, and I agree with the Lord Chief Justice that it should be dismissed without costs, and that there should be no costs of the appeal.

BOWEN, L.J.:—

This seems to me to be a very difficult case, and one very much upon the line, and I am not at all surprised that the proprietor of the *Morning Post* has taken the action which he did, or that the learned Judge in the Court below came to a conclusion different from that to which we arrive. Now what is the question we have to ask ourselves—the test of the law which we have to apply? This is an action the gist of which is that by embodying at the head of the paper the title "*Evening Post*" the Defendants, it is said, have put forward an untruthful representation and an untruthful representation which is calculated to injure the property of the *Morning Post*—the untruthful representation being an implied representation that there was a proprietary connection between the new paper and the old paper. That is the gist of the action. In order to see if it can be supported we must ask ourselves the question—is the title "*The Evening Post*" calculated to deceive persons into the belief that it was published by the proprietors of the *Morning Post* in a way likely to injure the business of the *Morning Post?* Unless this double proposition

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can be answered in the affirmative, the application for an injunction must fail. In order to succeed the *Morning Post* must make out that the title "*Evening Post*" is calculated to deceive people into the belief that the paper is published by the *Morning Post*, and in a way which is likely to injure the *Morning Post*. Now, first of all, as to the deception: is it calculated to deceive? Twenty persons have been deceived. I do not lay, I hope, undue stress upon that. Secondly, why has the title "*Evening Post*" been deliberately adopted by that paper. The world is wide, and there are many names. Why was there a persistent resolve to take the title "*Evening Post*" when the *Evening Courier*, or *Evening Gazette*, or some other name, might have been taken. The *Morning Post* apparently is not about to publish an evening paper; but suppose the *Morning Post* was intending, and did carry out its intention, of publishing an evening edition, what name would it be more natural to choose than the *Evening Post?* The *Daily News*, if it published an evening edition, would perhaps call it the *Evening Daily News*; but you cannot suppose that a paper which is called the *Morning Post* if it published an evening edition would call itself the *Evening Morning Post*. That would be too absurd. The natural title which the *Morning Post* could take would be the *Evening Post*. Now why has that title been taken? One ought not to hesitate when one is judging facts as well as law to draw a sharp line, and I do not hesitate to draw the inference that the title was taken to deceive somebody. But that is not enough. Is it calculated to deceive the public in a way which would injure the *Morning Post?* It may be that it is taken to deceive the public without injuring the *Morning Post*. In my opinion that is exactly what has happened in this case; it has been an attempt to deceive the public, but there has not been shewn to be within any measureable distance, any probability of injuring the *Morning Post*. The *Morning Post* is an old established paper—everybody knows it—its character and politics, and literary position. I am of opinion that this attempt is one which never could touch that. In the first place, it is not a competing paper, and there arises a broad distinction between this case and almost all the others which have been cited to us. A person would not buy the *Morning Post* the less because he buys

the *Evening Post*. When, if at all, is it to be suggested that the injury will be done to the *Morning Post*? Is it at the moment the *Evening Post* is bought, or is it afterwards? We asked the learned counsel who argued the case for the *Morning Post* how he suggested that a person who bought the *Evening Post* in the evening would be less likely to buy the *Morning Post* in the morning. The counsel was then driven to this ingenious suggestion, that a person going by railway might wish to buy his *Morning Post* over night. I cannot imagine a gentleman buying the *Morning Post* over night. Moreover, if you could do so, you would not want to do so. It is as unlikely as if you were to wish to have your breakfast over night. The only case in which I can conceive a person wanting his breakfast over night is when he was not likely to have it next morning; and, therefore, if a person were not likely to be able to purchase a *Morning Post* the next day, it is possible he might purchase the *Evening Post* the night before. But the hypothesis is that in such a case he would not be able to buy the *Morning Post* next morning, and if so where is the injury? It is too remote and fanciful to suppose that anything of that sort will happen. In the next place, is a person who reads the paper likely to be deceived? He must be an extremely unintelligent person if he thinks that the *Evening Post*, which disclaims all connection with the *Morning Post*, and writes upon different topics and in a different style, is connected with the *Morning Post*. The idea would explode itself before he got half way through the first page. I think the *Morning Post* is not likely to be hurt. Still I think a trick has been attempted by the new paper, and for that reason I think the justice of the case is sufficiently met by dismissing the action without costs, because no damage has been shewn as likely to accrue to the *Morning Post*—dismissing it without costs, as the persons against whom the action has been brought have been, in my opinion, guilty of a dishonest action.

Solicitor for Plaintiff: *J. A. Rose.*
Solicitors for Defendants: *Lewis & Lewis.*

M. W.

C. A.
1888
Jan. 19, 20, 27.

MAGNUS *v.* QUEENSLAND NATIONAL BANK.

[1885 M. 1616.]

Mortgagor and Mortgagee—Bank—Loan to Customer—Transfer by Three Persons to secure Loan—Authority to sell—Transfer to Nominees of Customer.

G., a stockbroker, who was one of three trustees and acted as broker to the trust, proposed to his co-trustees to sell *B.* stock belonging to the trust and re-invest in *N. E.* stock. The three trustees then, on the 27th of January, 1882, executed a transfer of the *B.* stock for a nominal consideration to two persons who were officers of a bank of which *G.* was a customer. *G.* gave the transfer to the bank as security for a loan by them to him, and the transfer was registered. *G.*, in February, 1882, paid off the loan, and on the 15th of February the bank transferred the stock to purchasers from *G.*, and, without giving any notice to *G.'s* co-trustees, allowed him to receive the purchase-money. He invested it in *N. E.* stock in his own name. In 1883 he sold the *N. E.* stock and misappropriated the proceeds. Shortly after the sale of the *B.* stock *G.* had given an account to his co-trustees shewing the sale of *B.* stock and a re-investment in *N. E.* stock, and in 1884 he rendered another account in which he represented the *N. E.* stock as still forming part of the trust funds. In 1885 he absconded. The co-trustees remembered hardly anything about the transaction, but admitted the genuineness of their signatures to the deed of transfer:—

Held (affirming the decision of *Kay*, J.), that the bank had occasioned the loss to the trust estate by allowing the purchase-money to come to the hands of *G.* who had no authority to receive it, and whom they had no sufficient reason for believing to have authority to receive it, and that the bank must therefore make it good at the suit of the co-trustees, although the co-trustees had been negligent in not seeing that the *N. E.* stock was registered in the joint names of the trustees.

THIS was an appeal by the *Queensland National Bank* from a decision of Mr. Justice *Kay* (1).

Bartle Goldsmid, and the Plaintiffs *Magnus* and *Halford*, were

(1) 36 Ch. D. 25.

trustees for the Countess *D'Avigdor* and her children of a legacy of £70,000, part of which was invested in £7828 *London, Brighton and South Coast Railway* debenture stock. *Goldsmid* was a stock-broker, and acted as the broker of the trustees. On the 26th of January, 1882, he wrote to *Magnus* proposing a sale of the above stock and a re-investment in *North Eastern* £5 per cent. preference stock. *Halford* admitted that he knew of the proposal to change the investment about that time. On the 27th of January the three trustees executed a properly stamped deed of transfer of the *Brighton* stock in consideration of 5*s.* to the Defendants *Buchanan* and *Smith*, who were officers of the *Queensland National Bank*, of which *Goldsmid* was a customer. Neither of the Plaintiffs had any recollection of having executed the transfer, but they admitted the genuineness of their signatures. *Goldsmid* on the same day borrowed from the *Queensland Bank* £50,000 for his own purposes, and deposited with them the transfer and the stock certificate. The transfer was sent to the company for registration, and the stock was registered in the names of *Buchanan* and *Smith*. Early in February, 1882, *Goldsmid* paid off the £50,000, and shortly afterwards, on the 15th of February, *Buchanan* and *Smith*, by the direction of the bank, and without communicating with the Plaintiffs, transferred the stock to persons to whom *Goldsmid* had sold it. *Goldsmid* received the purchase-money and invested it in *North Eastern* preference stock in his own sole name. In the following year he sold out this stock and appropriated the proceeds. In October, 1884, he sent to the Plaintiffs a statement of the investments of the trust funds, from which it appeared that the *Brighton* stock had been sold and the *North Eastern* stock bought with the proceeds, and the latter stock was represented as still forming part of the trust funds. In 1885 *Goldsmid* absconded, and his misappropriation was discovered. Shortly afterwards an order was made under the *Trustee Acts* vesting the right to recover the trust funds in the Plaintiffs. On the 13th of May, 1885, this action was commenced, seeking, *inter alia*, to make the *Queensland Bank* and *Buchanan* and *Smith* liable for the loss of the *Brighton* stock.

As stated above, the Plaintiffs remembered hardly anything about the transaction of January, 1882. It was shewn, however,

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that an account (1) was sent to the Plaintiffs by *Goldsmid* not long afterwards, from which it appeared that the *Brighton* stock had been sold and the proceeds re-invested.

This account was not produced at the trial in the Court below, but only the account rendered by *Goldsmid* to his co-trustees in October, 1884, which contained similar entries.

The *Queensland Bank*, by their statement of defence, alleged that *Goldsmid* was in the habit of borrowing money from them for the settlement days on the *Stock Exchange*, and of depositing securities with them to cover their advances; that on the 27th of January, 1882, he brought them the deed of transfer duly filled in and the stock certificate; that he represented to the bank, and they believed, on the faith of his representations and of the production by him of the transfer and the stock certificate, that *Magnus* and *Halford* had authorized him to give the stock to the bank as security; that such an authority would have been in the ordinary course of business, and that there was nothing to lead the bank to doubt the truth of *Goldsmid's* representation, supported as it was by the transfer and certificate.

The bank, in their defence, admitted that *Goldsmid* in February, 1882, paid off what he had borrowed from them, and requested them to transfer, and they did transfer, the stock to other purchasers. They did not state any reason for their having done so.

The bank proceeded by their defence to allege that since the commencement of the action they had discovered by the production of the Plaintiffs' documents that the Plaintiffs had authorized *Goldsmid* to sell the *Brighton* stock for the purpose of investing

(1) COUNTESS D'AVIGDOR TRUST A/C IN ACCOUNT WITH B. G. GOLDSMID.

DR.						CR.			
1882.			£	s.	d.	1882.		£	s.	d.
Feby.	Stp & fee Bgton deb		10	0	0	Jany.	Balance old a/c	4	0	3
	Purchase of						Sale of			
	8700 North Eastern 5% prefce stk	10/	9309	0	0		5000 Bgton deb stk . 100¾	6012	10	0
	Stp & fee . . .		46	17	6		2828 do . 120	3393	12	0
	Com . . .		23	4	0					
	Balance . .		21	0	9					
			£9410	2	3			£9410	2	3
						Feb. 15.	Credit balance . . .	21	0	9

in *North-Eastern* stock; that, when the bank transferred to the purchasers, the purchase-money was received by *Goldsmid* on behalf of himself and the Plaintiffs; that *North-Eastern* stock was bought with it, according to the intention of the Plaintiffs, but the Plaintiffs took no step to see that it was transferred into the joint names; and that if there had been any loss it was owing to their own negligence in this respect; and that no loss had been occasioned by any transaction with the bank.

Mr. Justice *Kay* decided that the bank were liable for the value of the *Brighton* stock at the time when they transferred it, and gave judgment against them for that amount with interest.

The bank appealed, and the appeal was argued on the 19th and 20th of January, 1888.

Cookson, Q.C., *Rigby*, Q.C., and *Farwell*, for the appeal:—

The just inference from the accounts, which shew that *Magnus* and *Halford* knew of *Goldsmid's* dealings with the stock and assented to them, is that they had given him authority to sell in such way as he thought best. If, then, they intended him to sell and to receive the purchase-money they cannot complain, for he did what they intended—his not dealing with the purchase-money properly is a subsequent matter which can in no way affect the bank.

[BOWEN, L.J.:—Does an authority to sell authorize anything more than to sell in the ordinary business-like way, and would it dispense with a re-transfer?]

A re-transfer would have been a mere useless form. If the equitable title is transferred it does not signify how the legal interest is got in. If this irregularity had caused the loss of the money the bank might be liable, but it did not, for the *North-Eastern* stock was bought, as *Magnus* and *Halford* intended. The loss arose from their neglecting their duty and not seeing to its being invested in the joint names. Mr. Justice *Kay* says that if the bank had communicated with the trustees before transferring to the purchasers, the loss would not have occurred; but that is pure speculation, an improbable speculation, for considering the confidence that *Goldsmid's* co-trustees had in him there is no

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reason to doubt that they would have said "transfer to the purchasers." The money came to *Goldsmid's* hands; it came to them properly, as he was the broker of the trustees and authorized to sell, so when it was there, the case as regards the bank is the same as if it was properly invested, and any prior irregularities are not material.

Romer, Q.C., and *George Henderson*, for the Plaintiffs:—

The first question is, what authority are *Magnus* and *Halford* to be considered to have given to *Goldsmid* by the transfer deed or otherwise.

[COTTON, L.J.:—The account of February, 1882, shews sale and re-investment, and was sent to the trustees. Must not the trustees, having made no complaint, be held to have sanctioned a sale by means of the transfer deed which they had executed?]

Goldsmid had suggested a sale, and brought to his co-trustees for execution a transfer to particular persons. Whether this be taken together with the letter of January, 1882, to *Magnus*, or separately, *Goldsmid* cannot be considered to have been authorized to sell to anybody but the transferees named in that deed. *Goldsmid*, in fraud of his co-trustees, used that deed for the purpose of borrowing. The deed only authorized a dealing with the transferees named in it, and the power was exhausted by the mortgage.

[COTTON, L.J.:—Does the bank state its reason for transferring to the persons to whom *Goldsmid* had sold?]

No. By their defence they say they believed that *Goldsmid* had authority to pledge, but they do not say anything about believing him to have authority to sell. The trustees by executing this transfer precluded themselves from disputing the mortgage, but beyond that their title to the stock was not affected. There is no evidence that they gave *Goldsmid* authority to sell the stock to any one else than the transferees in the deed. What the bank have to prove is, that after *Goldsmid* had exhausted his power to borrow, authority was given him to sell.

[LORD HALSBURY, L.C:—Suppose *Goldsmid's* co-trustees had

said to him, "You may sell to whom you please," and he had then done what he did, do you say the bank would still be liable?]

Yes. The irregularity of the transactions would even then have put the bank on inquiry, and communication with *Magnus* and *Halford* would have prevented the mischief. We say that after the agent has exercised his power in a way which is effectual against his principals the power is exhausted. The other side ignore the fact that the deed made the bank in the legal sense of the word purchasers. If the co-trustees had found out that *Goldsmid* had paid the bank they could have got the stock back without paying anything. The Appellants contend that as the money got into the hands of *Goldsmid*, who, as broker, ought to receive it, the money was at home, but this begs the question: if he had no authority to sell he had none to receive the purchase-money. He was authorized to sell by means of a particular deed and to the persons named in it. Even if any general authority to sell had been given it would have been revoked by the special authority given by the transfer deed. If there was a general authority, it was not first to mortgage and then to sell.

Cookson, in reply:—

A sale to third parties by means of a deed of this kind would not be out of the ordinary course of business.

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In this case it is not denied that the Defendant bank are in default. They received from three persons a certain amount of railway stock as security for a loan, and upon the loan being paid off (I will deal presently with the form of loan) the bank transferred the stock to purchasers, and allowed the purchase-money to be received by one of the three. Now it is not denied that, upon general principles, the bank were under an obligation, having received the stock from the three, to restore it to the three upon the repayment of the money which they had advanced. The doubts that I entertained in the course of the argument were, whether it could properly be alleged that the loss which is complained of, and against which relief is sought in

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these proceedings, was consequent upon the breach of duty by the bank. I am, however, disposed to think it clear, that when once the fact is established that money belonging to this trust has got into the hands of one of the three trustees without the consent of the others, and that by the default of the bank, we are not at liberty to speculate whether the same result might not have followed whether the bank had been guilty of that default or not. The bank have in fact been guilty of default. As a matter of fact they concurred in the money being handed to a person who had no authority, in my view of the facts, to receive it. They ought to have taken care that the three persons interested in the fund should receive the money, and they have not done so. I think the evidence to which reference was made is rather calculated to mislead one from the true question which the Court has to determine. I was very much struck by the accounts which were rendered to the two other trustees in the month of February; but upon looking at them more carefully those accounts are perfectly consistent with a strict compliance by the defaulting trustee with the authority conferred upon him by his fellows. Those accounts would have borne exactly the same appearance—would have exhibited the same results—if, instead of doing what has been done, the defaulting trustee had performed the function which he was intrusted to perform, and sold for the purpose of re-investing in the other investment authorized by the other trustees. In truth, the sole question which, as it appears to me, the Court has a right to determine is, whether upon these facts the authority which was given to the defaulting trustee to sell was pursued? He had authority to dispose of the stock for the purpose of sale—the ultimate object being re-investment in another form of security, and he placed in the hands of the bank that which was trust property, the bank knowing at the time that two other persons were interested in it. When the money advanced by the bank was repaid, the bank had before them the fact that two other persons were interested in the stock, and without authority from them, or notice to them, they pay the purchase-money of that stock, or allow it to be paid, to one. I think that the loss to the trust happened when, instead of being re-invested in the names of the three trustees, it was

placed in the hands of *Goldsmid* alone. The inference I should derive from the evidence would be this—not what was urged upon us, that this gentleman was intrusted by his co-trustees with plenary authority to do whatever he pleased, but in fact that they trusted to him so much that whenever he came to them and said, "Now I have got a fresh investment to make; you will sanction it, and I will send a proper transfer;" they did it, and I have very little doubt that he might have defrauded the trust in some other way. But as a matter of fact the specific authority given to him with reference to this particular investment was confined to the particular instrument which they then executed: and, as I say, I am not entitled to speculate whether he might have cheated his co-trustees in any other form. As a matter of fact what he did was this. There was no authority from the other trustees to the bank to allow this money to be paid to any but the three; and under those circumstances it seems to me that the loss has happened by reason of the default of the bank, and that the bank is therefore responsible.

For these reasons I am of opinion that the judgment of the learned Judge below should be affirmed.

COTTON, L.J.:—

I am of the same opinion. The facts are short, but I think I had better state them. On the 27th of January, 1882, the bank received from *Goldsmid*, who was a customer of theirs, a transfer executed by him and by his co-trustees (I shall deal afterwards with the question raised by Mr. *Rigby* whether in this case we ought to hold that there was an effectual transfer), and they took that transfer from him as security for a loan—the transfer being to certain persons who were their officers and trustees for them. Now, that advance which was made to *Goldsmid* was paid off before the 15th of February, and then the bank, knowing, as appeared on the face of the transaction, that the equity of redemption belonged not to *Goldsmid* alone, but to him and his two co-trustees, do not re-transfer to *Goldsmid* and to his two co-trustees, but, by the direction of *Goldsmid*, they sell the stock to purchasers and allow *Goldsmid* to receive the money.

Now as the loan which they had made had been paid off,

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although the transferees, the purchasers, got a good title as against the co-trustees, the bank would be liable to account for the money which they got for those shares. If the purchasers had known the facts they would not have got a good title, but as they did not know them they got a good title, but the bank was accountable to the trustees for the purchase-money. The only defence they could set up would be that they paid the money to, or allowed it to be received by, a person authorized on behalf of the trustees to receive and give a good discharge for it. Now we must consider whether in fact *Goldsmid* had on that sale any authority whatever to receive and give a discharge for the money. As I understand the case made by the bank it is this,—*Goldsmid* was a trustee, but he was also a broker; he was authorized by his co-trustees to sell, and if he was authorized as a broker to sell, that must carry with it an authority to receive the purchase-money arising from the sale, since in the ordinary course it is paid to the broker. But we must look at the evidence for the purpose of seeing what authority was really given to *Goldsmid*, and I think that we must decide the case as regards his authority by the documents which are before us. I think so for this reason. Although undoubtedly in cross-examination, one at least of the Plaintiffs, if not both of them, said, "Well, I suppose I authorized *Goldsmid* to sell," yet that is only when they were referred to the transfer which had been executed by them, and of course they would say, "Well, looking at that, I cannot deny that I gave him authority to do what I contemplated would be done by that instrument of transfer." But the documents begin by a letter of the 26th of January, the day before the execution of the transfer, and that is a letter not to both of the trustees, but to one of the trustees, written by Mr. *Goldsmid*, saying that he intended and advised a change of investment by selling the *London and Brighton* stock and by investing in *North-Eastern*, and then he says if you agree I will bring or send to you the transfers. We do not know what then took place, except that one of the trustees went to the office of *Goldsmid* and there executed the transfer, as appears by the attestation; and the other executed it also. Now, in my opinion, after that letter the trustees might reasonably have

considered, and would have considered, that the instrument which was so sent was to carry into effect that which had been proposed by *Goldsmid* to them, that is to say, they looked upon it as a transfer in order to effect a sale which undoubtedly they knew was intended; and undoubtedly they assented to its being done be means of that instrument. It is said that the instrument which they executed was expressed to be for a nominal consideration of 5*s.*—and that therefore they could not have meant it to be the instrument to give effect to what they had authorized—the sale of the securities and reinvestment in a different stock. But in my opinion not only do they say that they are certain that they never executed an instrument with a nominal consideration, but I think that the proper inference is, that the trustees relying, as they did, on one of their number, who was also a broker, when, after that letter, an instrument was sent to them which was a transfer of this stock, with a sufficient stamp upon it, would not look to see whether it was for a nominal consideration only, but would consider that it was executed in order to carry the sale into effect—in order that by that instrument there might be a sale and conversion into money of stock to be re-invested in other stocks. And undoubtedly they must be taken to have authorized him as broker to carry into effect the transaction of which that transfer was to be part. Now it was urged here—I think both by Mr. *Cookson* and by Mr. *Rigby*,—that this instrument—this transfer for a nominal consideration to certain persons, who were to be trustees, was part of the ordinary mode in which brokers deal with property which they have to sell, but there was no evidence to that effect, and I should think it decidedly contrary to reason, because on the transfer of this security, even for a nominal consideration, a heavy stamp had to be paid, and it was not suggested by any person, knowing anything about such transactions, that a transfer to trustees, where a broker is authorized to sell, is part of the ordinary way of carrying out the sale.

The only document referred to before Mr. Justice *Kay*, besides the transfer deed, was an account of October, 1884, in which the sale of this stock was mentioned, and in which the re-investment in different stock in the names of the trustees, which never took

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place, was also mentioned. But what was more striking was an account which was rendered at a previous date—we do not know when—an account down to the 15th of February, 1882. But to my mind, although it is undisputed here that the co-trustees authorized a sale by *Goldsmid*, as broker, in accordance with the transfer which they had executed, yet that in no way shews that they gave him any different authority. It is entirely consistent with their supposing and believing that he, as broker, had acted on that transfer which they had given to him, and that he then had re-invested the money. Now, *Goldsmid* did not use the authority which was given to him to transfer the shares to a purchaser by means of that transfer executed by his co-trustees—he used that transfer improperly to obtain, for his own purposes, a loan from his bankers; and, in my opinion that does not justify the bank in saying that his co-trustees authorized him, as broker, to act for them in a subsequent sale by the bank. In my opinion the Judge was quite right—though he expressed his opinion in somewhat different language from what I have done—in saying that the authority of *Goldsmid*, as a broker, was at an end before this sale by the bank. I say, in different language, but to the same effect, that there is nothing to justify us in holding that *Goldsmid*, as broker, was authorized to act as broker for the trustees on the occasion of a sale, not by the trustees, but by the bank, and therefore, in my opinion, the bank having taken upon themselves to act on his direction, and having paid to him the purchase-money as a person authorized on behalf of his co-trustees to receive it, must take the consequences of his not being so authorized, and must be liable to pay the purchase-money to the trustees, to whom they knew that they ought to have re-transferred the property.

I should mention a point, to which I said that I should revert —that urged by Mr. *Rigby*—that the case made by the pleadings, which we must assume to be correct, is that this transfer was not executed so as to be an effectual transfer. The statement of claim does undoubtedly allege that it had never been executed by the Plaintiffs so as to be a perfect instrument. But the bank say entirely the contrary; and as they allege that it was a perfect instrument when brought to them, we ought, in my opinion,

to decide, notwithstanding the allegation in the statement of claim, in accordance with that which, as between these parties and against the bank, must be taken to be the true state of things. There was no evidence in support of the allegation in the statement of claim, and we have the allegation and statement by the bank to the contrary, they being the persons who received this instrument when it was executed.

Then there is one other point with which one ought to deal. It was urged very strongly that the negligence of the trustees was the real cause of the loss to the trust; and I agree that they were negligent. They ought to have seen that the *North-Eastern* stock had been put into their names. It never was. But in the view which I take of the case it is not necessary to consider that point; because, if the bank having this stock, in respect of which, the loan having been paid off, they were accountable to the trustees, paid the money arising from that property, not to the trustees, nor to any person authorized by the trustees to give a good receipt for it, they, in my opinion, must be held answerable to the trustees just as if the money was still in their hands. In my opinion the appeal must be dismissed with costs.

BOWEN, L.J.:—

The question we have to decide is a very short one, namely, whether the property of a trust has been lost through any wrongful conduct on the part of the bank.

It will be found, I think, upon reflection, that the strength of the argument on behalf of the Appellants rests upon a fallacious and misleading use of the expression, "loss caused by the conduct of the bank"; and that the learned counsel for the Appellants, in pressing home the argument that whatever the conduct of the bank may have been it did not cause the loss to the estate, was using the term in a popular and non-legal sense, and one which is not sufficient to support his proposition. When was the property of the trust lost? At the time when it first passed into unauthorized hands. The contention of the Plaintiffs is, that the bank knowing, as they must have known, that they were mere mortgagees, believing, as they no doubt believed, that *Goldsmid* had authority to mortgage to them, but having no reason to

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suppose that he had authority to do anything else, had no right when the purchase-money from the ultimate purchaser found its way into their hands, to transfer that purchase-money to *Goldsmid*, he having no actual authority to receive it and no apparent authority to receive it. If that proposition is made out, then the loss occurred at the moment when the trust money was diverted by the bank into hands which were not authorized to receive it. The case accordingly turns upon this—had *Goldsmid* authority to receive the purchase-money, or had the bank the right to suppose from the way in which the stock had been dealt with that he had such authority? It seems to me that he certainly had no such authority in fact. He cannot, in my opinion, be held to have had any further authority than that which can be collected either from the documents or from the accounts, for I entirely assent to what has been said by the Lord Chancellor and the Lord Justice, that the general language used in cross-examination by the trustees is not really a statement by them of any incidents present to their own memory, but merely a summing-up in general language of what they themselves deemed to be a reasonable deduction to be made from the documents already in evidence. We must, therefore, look to the documents to see what was the authority conferred upon *Goldsmid*. Before we begin, we must ask ourselves what the state of the crucial and important document was at the time it passed into his hands from the trustees. It was said on one side that it was not filled up but was in blank at the time when the trustees passed it to him, and on the other that it must be taken to have been at that time filled up in the way in which it now appears to be filled up. It is a question of *onus* of evidence; and it seems to me, though I do not in any way dissent or desire to express any different opinion from that which has fallen from the Lord Justice, that the question may be decided by applying the simple principle of law that, in the absence of evidence, no illegality or irregular proceeding in the transaction of business is to be presumed. It is to be presumed that the law has been carried out, not that it has been broken. The document, therefore, I think, must be taken in the first instance to have passed into the hands of *Goldsmid* in the form in which he used it. What was the authority of which that

document is the evidence? The accounts which were afterwards accepted shew no more than that the trustees imagined that whatever had been done had been done regularly; they fall short of shewing that they were at all aware of what had really occurred. It seems to me that the document in question is only evidence of an authority at most to sell the shares and raise the money in the ordinary and usual way in which such a document would be used for the purpose. Either the trustees must be taken to have read the document, which is in a peculiar form, or not to have read it. If they had read it, they would have seen, I think, that they were committing a breach of trust in signing a document in that shape; that they ought to have seen that the proper names of the purchasers and the proper statement of the consideration appeared on the document itself. If they did not read it, they must have assumed that they were placing an ordinary document in ordinary shape in the hands of their broker, and they cannot be considered to have intrusted him with anything more than an authority to sell the shares in the ordinary business way. But it seems to me he had no authority to sell the shares in the irregular way in which he did, by first mortgaging, by then paying off the mortgage, and by then nominating persons, to whom the legal estate should be conveyed by the mortgagees, and who should pay the purchase-money to the bankers, who were to pay it over again to himself. But had the bank any right to assume that there was such authority? The document itself, which expresses no consideration except that of 5*s.*, is, to my mind, cogent and complete evidence to shew that the bank, as indeed appears from the facts generally, had nothing at all to lead them to suppose that *Goldsmid's* authority was anything beyond what it really was. Indeed the learned counsel for the Appellants hardly argued this matter upon the view that *Goldsmid* had an apparent authority in excess of his acting as broker. Now, as soon as the conclusion is arrived at that *Goldsmid* had no authority to receive the purchase-money, it seems to me that the conclusion of the learned Judge in the Court below follows. We were asked, indeed, to believe that whatever the breach of duty on the part of the bank was, it did not ultimately lead to the loss to the fund which has been sustained. That

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really is an illusion; it is an ocular illusion to present the case in that way. The loss occurred as soon as the money which belonged to the trust was diverted into the hands of a person who had no right to represent the trust. The proposition presented to us by the Appellants, if divested of its popular and specious look, is this, that we ought not to visit those who lose trust property with the consequence of having to make it good, provided it can be shewn or surmised that, if they had made it good, somebody else would have lost it over again. Is that a tenable proposition? A man knocks me down in *Pall Mall*, and when I complain that my purse has been taken, the man says, "Oh, but if I had handed it back again, you would have been robbed over again by somebody else in the adjoining street." That is the argument of the learned counsel for the Appellants, as soon as the proposition for which they have contended is reduced to its bare bones.

I am, therefore, of opinion that the appeal ought to be dismissed with costs.

Solicitors for Appellants: *Stretton, Hilliard, Dale, & Newman.*
Solicitors for Plaintiffs: *Futvoye, Field, & Baker.*

H. C. J.

C. A.
1888
Jan. 27.

In re PRATER.
DESINGE *v.* BEARE.

[1886 P. 876.]

Will—Construction—My Property at R.'s Bank—Share Certificates.

Bequest of "half my property at *R.'s* bank." At the time of his will and of his death the testator had at *R.'s* bank in *Paris* a cash balance and certificates of French shares, some inscribed and some transferable by delivery, which were deposited with the bankers, who received the dividends and carried them to his credit. He had nothing else at the bank:—

Held, by *Chitty*, J., that only half of the cash balance passed by the bequest:—

Held, on appeal, that a moiety of the shares also passed.

THIS was an appeal from a decision of Mr. Justice *Chitty* (1).

The testator by his will dated the 25th of October, 1875, after appointing executors, bequeathed "the following pecuniary legacies." Then followed a legacy of £4500 to his sister, and legacies of £4000, £2000, £2000, £2000, £500, and £1000. He then gave directions as to the publication of his medical manuscripts, and proceeded as follows:—

"I give to the *Société Protectrice des Animaux of Paris* the sum of £500, also half of my property at *Rothschilds'* bank, *Rue Lafitte, Paris*. The remaining half of my property at *Rothschilds'* bank I give to be divided equally between the following two public libraries in *Paris*, namely, the *Mazarin* and the public library in the *Rue Richelieu*."

The testator, after giving some other legacies, and directing that all legacies should be paid free of duty, and that charitable legacies should be paid out of pure personalty, gave the residue of his estate and effects to his sister.

The testator, who was domiciled and resident in *England*, but was in the habit of paying long visits to *Paris*, died in 1885.

At the time when the testator made his will there was standing to his credit at *Rothschilds'* a cash balance of 11,031 francs. He had also in their custody certificates for 802 francs French rentes

(1) 36 Ch. D. 473.

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nominatives (inscribed in his name), fifty-nine *actions nominatives* in a French railway company, forty-five *actions au porteur* in the same company, and 105 francs *West of France Railway* obligations *nominatives*. The bankers used to receive the income and carry it to his current account.

At the testator's death he had a cash balance of 7823 francs, and ninety-nine *actions nominatives* and forty-one *actions au porteur* in the *Paris and Lyons Railway Company*, the certificates of which were in the custody of the bankers, and which were of the value of about £7000.

At neither time was there anything else belonging to the testator in the custody of his bankers.

It was shewn by evidence that *actions au porteur* were transferable by delivery, but that *actions nominatives* were registered in the name of the holder, and on transfer of them, which could not be effected without production of the certificate, a new certificate was issued to the transferee. It was also in evidence that if an English Court should order the certificates of the testator's *actions nominatives* to be delivered to the Plaintiffs (the officers of the *Société Protectrice des Animaux*) they would be enabled, by having the possession of such certificates, to receive the dividends and to be registered as owners.

Mr. Justice *Chitty* decided that the gift to the *Société* passed nothing but half the cash balance standing to the testator's credit. The Plaintiffs appealed, and the appeal was heard on the 27th of January, 1888.

Sir *Arthur Watson*, Q.C., and *R. F. Norton*, for the Appellants:—

The cases referred to below were of this character: "I give my furniture and effects in my house." Does that pass a bond? It was very reasonably held that it did not, and the reason given was that *choses in action* have no locality, and that the bond did not pass because it was only evidence of the *chose in action*. If that principle were to be pushed to its full extent here we should take nothing, for a cash balance is as much a *chose in action* as the money due on a bond. Mr. Justice *Chitty* did not go that length, but thought that half the cash balance would pass, because "money at my bankers" is a common term. The fact is,

that the testator has used an expression which is not with strict accuracy applicable to anything belonging to him, and the question to be decided is what he meant by it. Now nobody would think of describing his cash balance by the expression "my property at my bankers."

[They were then stopped by the Court.]

Romer, Q.C., and *Ingle Joyce*, for the executors :—

The rule is established that *choses in action* do not pass by a gift of chattels in a particular locality: *Marquis of Hertford* v. *Lord Lowther* (1); *Fleming* v. *Brook* (2). In the latter case a distinction is taken between bank notes, as being *quasi* cash, and other *choses in action*. So here a distinction is to be taken between a cash balance, which is *quasi* cash, and other *choses in action*. Debts due from persons in *Northumberland* will pass under a gift of property in *Northumberland*: *Earl of Tyrone* v. *Marquis of Waterford* (3); debts in *Mauritius* under a gift of property in *Mauritius*: *Guthrie* v. *Walrond* (4); debts in *England* under a gift of property in *England*: *Arnold* v. *Arnold* (5). The cash balance, then, being due from the bankers came within the description of property at the bank, and there being something properly answering the description, nothing not properly answering it can be included. *Stuart* v. *Marquis of Bute* (6) is in our favour.

Sir *A. Watson*, in reply.

LORD HALSBURY, L.C.:—

We are called upon to construe this instrument, such as it is, and, speaking for myself, I certainly do not mean to lay down any general canon of construction applicable to cases of this nature, because I do not believe it is possible to give any abstract meaning to words of this description. The word "property" is as wide as anything can be. But here the words are "property at *Rothschilds*' bank." If those words are taken in

(1) 7 Beav. 1.
(2) 1 Sch. & Lef. 318.
(3) 1 D. F. & J. 613.
(4) 22 Ch. D. 573.
(5) 2 My. & K. 365.
(6) 11 Ves. 657.

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their strict and proper signification there was nothing to answer to them, for there was no property at the bank. I do not think that the cases which shew that debts due from persons in a particular district are included in the words "property of any kind or description whatsoever" in that district are applicable to this case, because here the words are used by the testator as part of the description of the property disposed of, and he makes it part of the description of the property that it is property at the bank. Mr. *Romer* has, I think, very candidly admitted that the description is inaccurate, and did not strictly apply, either to the titles to these shares in different commercial adventures, or to the balance which the bankers owed to their customer. If therefore it is once conceded that the words were intended to operate on something, and to give something to the object of the testator's bounty, we must see what the testator intended, and consider what an ordinary testator, not possessed of special legal knowledge, using language with reference to this particular subject-matter, must be intended to mean by the use of these words. Mr. Justice *Chitty* says, and in that I agree with him, that you must take the ordinary and popular meaning of the words to be found in the instrument. Now, what is the ordinary and popular meaning of these words? Did anybody ever hear a man denote his cash balance by such a phrase as "my property at my bankers?" I should say, if a distinction were to be taken, that if a man had at his bankers what we popularly call a cash balance, and the bank had possession of documents of title belonging to him, he would be more likely to refer by that expression to those documents of title than to his cash balance. I am unable, however, to draw such a distinction. The testator having in the earlier part of his will given pecuniary legacies, gives to this society a legacy of £500, "also half of"—not my money, not my cash balance, but "half of my property at *Rothschilds'* bank." On the most ordinary principles of construction there is nothing to cut down the wide general term "property," and on that ground, with the additional enforcement arising from the fact that in the preceding part of the will he had words before him which point to mere money as distinguished from property, I come to the conclusion that when he said "property

at *Rothschilds'* bank" he meant everything belonging to him with which the bank was concerned. I am unable to derive any assistance from any of the circumstances outside the will itself. I do not see anything in the circumstances which existed at the time of the making of the will as distinguished from those existing at the time of the death to throw any light on the meaning of the testator. I am therefore remitted to the words in the will, and, putting myself as well as I can in the position of the testator, I think that by the language which he used, he intended to describe whatever the bank had of his, and which on his demand they would have been bound to give up.

I am therefore unable to concur with the learned Judge in the construction he has put on these words, and I think his judgment must be reversed.

COTTON, L.J.:—

What we have to decide is, what is the true construction of a gift of "also half of my property at *Rothschilds'* bank" in the testator's will following this, "I give to the *Société Protectrice des Animaux* the sum of £500." Mr. Justice *Chitty* has come to this conclusion, that "half of the property" only meant half the balance appearing due to the testator on his account with his bankers. I am unable to agree with that conclusion. It is true that in the previous part of his will he speaks of giving "the following pecuniary legacies," but I think that means the legacies he has expressed by sums of money. He gives to this society a legacy which he expresses in a sum of money, £500. But then he gives something which he expresses in different language. At the time of making his will and at the time of his death there was in my opinion nothing which would properly come within the description of "my property at *Rothschilds'* bank, *Rue Lafitte*." But at both times he had a balance due to him from these bankers, and he was in the habit of leaving with them the certificates of certain shares. Some of them were shares which passed by mere delivery of the certificates, and with regard to the others, as I understand the last evidence read to us, although they are *nominatives*, yet if any one was entitled to have the certificates, then on production of those certificates his

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name would be inscribed as the owner of the shares instead of the name of the person to whom the *nominative* certificates were granted. Now, there being nothing to answer strictly the description of "property at my bankers," because I think that neither the balance due by the bankers nor the certificates of these shares could strictly or properly be described as property at his bankers, we must consider what the testator is to be taken to have meant. Property at his bankers is not an expression which a person would use to describe the balance at his bankers, he would describe it as money at his bankers. Here we have "property." Property is a word of the very largest description, and looking at this will I see nothing to cut it down to "money" so as to make it pass only the bankers' balance. Though people would not ordinarily describe a cash balance at their bankers as property at their bankers, yet they might do so, but why may not the testator so describe these shares, which are not really property at his bankers, but are so in this sense, that the certificates without which the title to these shares cannot be asserted are in the hands of the bankers. As to the shares which are not *nominative*, the certificates would give the holders of them a right to the shares. As regards the other shares it appears that whoever had a title to the certificates would be entitled to have the shares put into his name and receive the dividends. The shares might then very well be popularly spoken of as property at his bankers.

It is said that authority is against us. No doubt there are a great many cases which lay down that *choses in action* cannot be referred to as of any particular locality. Again, there are cases where a gift of property in a particular locality has been held to include debts due from persons in that locality. I think these latter cases go upon this—that there was in the wills a sufficient indication of intention to include under the description of property in a particular place that which really cannot have any locality. Those cases, in my opinion, shew that the rule that *choses in action* have no locality must not deter us from holding them to be included in a gift of property in a particular locality, if we come to the conclusion that the intention of the testator was so to include them.

Mr. *Romer* referred to the case of *Fleming* v. *Brook* (1) decided on the authority of *Moore* v. *Moore* (2). But in *Moore* v. *Moore* the words were "goods and chattels," and Lord *Redesdale* said that "goods and chattels" did not properly apply to notes, bills of exchange, or bonds, and there was not anything in the context to give a more enlarged meaning to those words. I do not think that this case of *Moore* v. *Moore* has the effect which Lord *Redesdale*, according to the report, seems to have attributed to it. I do not at all dissent from, or desire to say that we should overrule if we could, any of those decisions which have been quoted to us, but, having regard to the facts existing at the time when the testator made his will, I have come clearly to the conclusion that what he intended was to give, not only half the balance at his bankers, but also half the shares the certificates of which were at his bankers. It would be a very different thing if they were title deeds of real estate. I do not think that any one would describe an estate in *Suffolk*, the title deeds of which were at his bankers, as a property at his bankers. There is a wide difference between real estate having a particular locality, and shares, which may, I think, be described by a person not having any great legal knowledge as in the place where the certificates are. In my opinion, we ought to say that the bequest in question includes not only half the balance due from the bankers, but also half of the shares the certificates of which were at the bankers at the testator's death.

BOWEN, L.J.:—

I am of the same opinion, and if it were not for the usual practice of this Court when it differs from the learned Judge who has decided the case in the tribunal of first instance to pronounce severally our views, I should say nothing, but leave the matter upon the language, much better than my own, which has already been used. But out of respect to the learned Judge I add my own individual conclusion in my own way.

The question we have to decide is the meaning to be given in this will to the words "my property at *Rothschilds*' bank." We have been pressed with a great many cases of gifts of property

(1) 1 Sch. & Lef. 318. (2) 1 Bro. C. C. 127.

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described as situate in or connected with a particular locality, from which cases the learned counsel for the Respondents suppose that some principle can be deduced which ought to lead us to support the judgment of Mr. Justice *Chitty*. With regard to all such cases, it seems to me to be important to remember that they must all be decisions upon the language of particular wills. The term property at a bank, or property situate locally at any other place than a bank, is not language which has received or is capable of receiving a stereotyped meaning which is to last for all time and to apply to every will by whomsoever made, but is an expression which must receive light or colour from one or other of two sources, the context, and the circumstances of the testator. Though ninety-nine out of one hundred cases in which similar words have been used may have been decided in the same way, they are no authority for the hundredth case if the circumstances and the context in the hundredth case are such as to be sufficient to make a difference in the meaning of the words. As regards the context of the present will, as the Lord Chancellor has pointed out, we find that in the pecuniary legacies, strictly so called, when money is given, money is spoken of, and when for the first and only time in the will the testator passes to the larger term "property," there is nothing in the context which should lead us to suppose he may not have intended a distinction between the larger and the narrower term.

Then as to the circumstances of this case. The testator had at this bank a money balance. He had also at the bank the certificates of two classes of *actions* or shares in commercial undertakings in *France*, the distinction between which classes may, I think, be neglected for all purposes of this case. With regard to all of them the effective value of the documents is great according to French law, so that the person who has them possesses, at all events, something which would be of considerable value in enforcing his right to the shares, and, in fact, the documents represent, according to French law, nearly as much as in popular language, the right to the shares. The testator then uses these words, "my property at *Rothschilds*' bank." If we are to apply the strictest and narrowest construction to those words, nothing that the testator possessed in connection with the bank,

neither his money balance in their hands nor these shares, can properly be described as property at the bank. But to say that the testator had nothing at all at the bank would be to render the bequest insensible. We must therefore search and find, if we can, some popular though less accurate use of the term "property at the bank," which will satisfy the exigencies of the case, and render sensible a disposition which was meant to have some legal effect.

Then we find this double class of property, as it may be called, at the bank, the cash balance and the certificates of the shares. Are we to draw a line between the two and to say the term "property" meant one thing and not the other? Why so? I agree with what the Lord Chancellor has said, and the Lord Justice has followed him in affirming, that if one were to press one's mind in the direction of severe and strict criticism, the rights which were evidenced by share documents kept in a banker's box at the bank, would much more naturally satisfy the popular description of "property at the bank" than even the cash balance. But certainly I can see no reason for excluding the shares and including the cash balance, which is the judgment of the Court below. For the reasons given by the Lord Chancellor it seems to me that we are driven to put a popular construction on words which, under other circumstances and with a different context, might well receive a different construction.

I will only add, that in *Stuart* v. *Marquis of Bute* (1), which was relied on in the Court below, there were other matters which would satisfy the words of the will without including *choses in action*, and in *Moore* v. *Moore* (2), as has been pointed out, the Court had to interpret the words "goods and chattels," and the only decision in that case was that a bond in the house did not come within the description of goods or chattels in that house. I agree with the Lord Chancellor and the Lord Justice *Cotton* that this decision must be reversed.

Solicitors: *T. Parker Dixon; Wilkinson & Howlett.*

(1) 11 Ves. 657. (2) 1 Bro. C. C. 127.

H. C. J.

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Dec. 13, 14.

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[1886 B. 3051.]

Conveyance—General Words—Easement—Landlocked Tenement—Right of Way—Way of Necessity—Way necessary for convenient User of Tenement—Continuous and apparent Easement — Unity of Possession — Implied Grant.

By a lease in 1877 the lessor demised to the lessee a rectangular plot of building land, *A.*, in the corner formed by the intersection of two public roads, of which one passed along the front and the other along the side of the land.

By a lease of even date the same lessor demised to the same lessee another rectangular building plot, *B.*, immediately adjoining *A.*, and also facing the front road but having no direct access to the side road. Both plots abutted at the rear upon a boundary or party wall.

The lessee then built a house on each plot and laid out the ground at the back as a garden to the house, with the exception of a narrow strip at the rear of both plots, which he formed into and used as a road or back way from the house and garden, *B.*, into the public road along the side of *A.* This back-way was bounded on the one side by the party-wall and on the other by the garden walls of *A.* and *B.*, a gate into it being made by the lessee in the garden wall of *B.*

The house on *B.* completely blocked all access from the front to the garden behind, except by a tiled passage or hall forming part of the house, with a door at each end, one door opening into the garden.

In 1878 the lessee assigned to the Defendant the whole of plot *B.*, as described in the lease thereof, and also the house thereon, "with their rights, easements, and appurtenances." In 1879 the lessee assigned to the Plaintiff's predecessor in title the whole of plot *A.*, as described in the lease thereof, and also the house thereon. Each assignment thus included part of the soil on which the back-way had been formed, but neither deed contained any reference to the back-way, and in particular the assignment to the Plaintiff's predecessor contained no reservation of a right of way over his portion of the soil in favour of the owners or occupiers of *B.*:—

Held, that, on the assignment of *B.* to the Defendant, a right of way over the Plaintiff's portion of the soil of the back-way into the side road passed, not as a way of necessity, but by implied grant as being in the nature of a continuous and apparent easement.

The doctrine of implied grant as applicable to easements in the nature of continuous and apparent easements, discussed.

By a lease, dated the 5th of October, 1877, a plot or piece of building land at the corner of *Augusta Road* and *Park Road*, at

Moseley, Worcestershire, and indicated on a plan in the margin of the lease, was demised by the lessors to *William Letts,* without any general words, for the term of ninety-nine years at the rent thereby reserved, a right being granted to *Letts* of erecting a party-wall on the north-east boundary of the land.

By another lease of the same date a larger plot or piece of building land immediately adjoining, and indicated on a plan in the margin of the lease, was demised by the same lessors to *Letts,* "together with all ways, rights, easements, and appurtenances belonging thereto," for the term of ninety-nine years at the rent thereby reserved, a right being granted to *Letts* of erecting a party-wall on the north-east boundary of the land.

Shortly after the date of the leases *Letts* built a boundary or party-wall along the north-east side of both plots, and on part of the first plot he built a house called "*Normanhurst.*" The second or larger plot he divided into two, and on part of the half plot next "*Normanhurst*" built a house called "*Cottisbrook,*" and on part of the other half plot a house called "*Westbourne.*" All three houses fronted towards, and had entrances into, *Park Road,* the ground behind each being enclosed and laid out as a garden.

The garden of "*Westbourne*" extended right up to the above-mentioned party-wall, but the gardens of "*Cottisbrook*" and "*Normanhurst*" stopped about four feet short of it, a strip of land thus being left between the party-wall and those two gardens. This strip of land thus divided off and separated from the other land comprised in the two leases, *Letts* laid out as a back private way from *Augusta Road* to the gardens of "*Cottisbrook*" and "*Westbourne,*" this back-way being inclosed throughout its length on the one side by the party-wall and on the other by the garden walls of "*Normanhurst*" and "*Cottisbrook.*" "*Cottisbrook*" and "*Westbourne*" each had a gate in its garden wall opening into the back-way, but "*Normanhurst*" had none, as it had a side entrance directly into *Augusta Road.* The entrance from the back-way into *Augusta Road,* which was a public road, was closed by a gate which was usually kept locked, and of which, until the assignment to the Defendant hereafter stated, *Letts* or his agent had the key.

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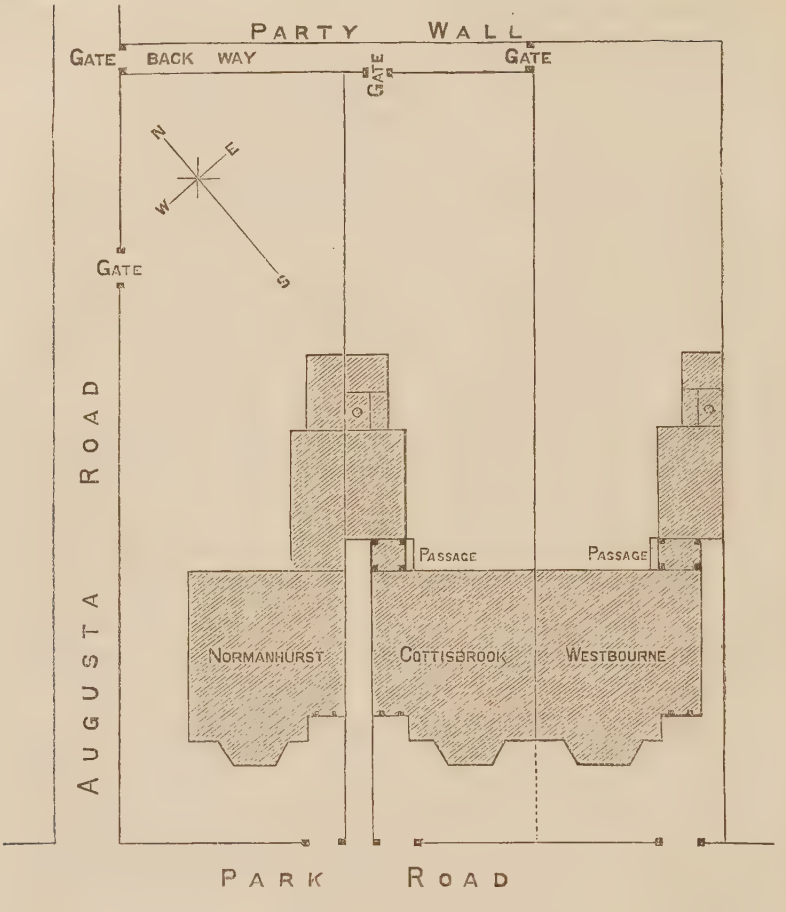
The following is a plan of the properties:—



The back-way having thus been formed and used as a mode of access to the gardens of "*Cottisbrook*" and "*Westbourne*," by an indenture, dated the 29th of June, 1878—after reciting the second lease and the erection of the two houses "*Cottisbrook*" and "*Westbourne*"—*Letts* assigned to *John Aston* and *George Lyttelton Aston*, "All and singular the said piece of land and premises comprised in and demised by the hereinbefore recited indenture of lease or expressed so to be, and also all those the said two messuages erected on the said piece of land, together with their and every of their rights, members, and appurte-

nances," for the residue of the said term of ninety-nine years granted by such lease, by way of mortgage for securing £950 and interest. The terms of that assignment thus included the site of so much of the back way as was conterminous with "*Cottisbrook.*"

By an indenture of the 2nd of July, 1878, *Letts* assigned the plot of land demised by the first lease, and also the house thereon, called "*Normanhurst,*" "with their and every of their appurtenances," to *John Careless* for the residue of the term by way of mortgage for securing £700 and interest. The plot of land comprised in that assignment was therein described by identically the same description as that in the lease, and consequently the assignment included the soil of so much of the back-way as was conterminous with "*Normanhurst.*"

By an indenture of the 14th of December, 1878, after reciting the second lease of the 5th of October, 1877, with the description of the plot comprised therein, and also the mortgage of the 29th of June, 1878, to *J. Aston* and *G. L. Aston, Letts* and his said mortgagees, *J. Aston* and *G. L. Aston,* for the considerations therein mentioned, assigned to the Defendant *Edward Alabaster,* for the residue of the term granted by that lease, and discharged from the mortgages thereon, "All the said piece or parcel of land, hereditaments, and premises by the said indenture of the 5th day of October, 1877, expressed to be demised, together with the two messuages or dwelling-houses ('*Cottisbrook*' and '*Westbourne*') erected thereon since the date of the said lease, with their rights, easements, and appurtenances." Upon the execution of that assignment *Letts* handed to the Defendant the keys of the garden gates of "*Cottisbrook*" and "*Westbourne,*" and also the key of the gate leading from the back-way into *Augusta Road.*

By an indenture of the 13th of November, 1879, *Letts,* for the consideration therein mentioned, assigned the plot of land "comprised in and demised by" the first lease, and also the house thereon called "*Normanhurst,*" together with the appurtenances, to one *Flint,* absolutely, for the residue of the term, but subject to the mortgage to *Careless:* and by an indenture of the 13th of December, 1880, *Careless* and *Flint,* for the consideration therein

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mentioned, assigned the same premises to the Plaintiff, *Henry Brown*, for the residue of the term, discharged from the mortgage thereon.

Neither of the assignments of "*Normanhurst*" contained any reservation in terms of a right of way for the owners or occupiers of "*Cottisbrook*" or "*Westbourne*" over the piece of private way at the back of "*Normanhurst*," and, in fact, none of the deeds relating to the several properties noticed the existence of the back way, or contained any reference to it in express terms. There were no plans to any of the deeds except the two original leases, and each of those plans shewed simply a rectangular piece of land coloured pink, which included the soil of the corresponding piece of the back-way, but without any line or other indication of an intended back-way.

Disputes having arisen between the Plaintiff and the Defendant as to whether the Defendant had, under the assignment to him, any right of way over the Plaintiff's piece of the private way at the back of "*Normanhurst*," the Plaintiff brought this action, claiming a declaration that the Defendant was not entitled, as against the Plaintiff, to any right of way from or to the Defendant's two houses over or across the Plaintiff's land demised by the first lease to or from *Augusta Road;* and an injunction to restrain the Defendant from passing over or otherwise trespassing upon the Plaintiff's said land.

In his statement of claim the Plaintiff alleged that none of the deeds under which he and the Defendant respectively claimed, contained any reservation or grant of any right of way over the land demised by the first lease to or for the benefit of the owner, lessee, or occupier of the hereditaments comprised in the second lease; and that, consequently, the Defendant was not entitled to any such right of way.

The statement of defence contained the following allegations:

"(7.) Prior to and at the date of the said indenture of the 14th of December, 1878"—the assignment of "*Cottisbrook*" and "*Westbourne*" to the Defendant—"and prior to the 29th of June, 1878"—the date of the mortgage of those two properties—"the said way or passage was, and ever since has been, necessary for the proper enjoyment of the part of the land and houses conveyed

thereby and for which it had been previously used. Without the said way or passage, egress or ingress from the back part of the two houses could not and cannot be made. It was a continuous and apparent way or passage used by the said *William Letts*, the common owner of what is now the Plaintiff's and Defendant's land, previous to and at the time of the making of the said indenture and prior to the 29th of June, 1878, and was necessary for the comfortable enjoyment of the part granted by him to the Defendant; and by the grant of the land and houses thereon of the 14th of December, 1878, the said *William Letts* passed the right of way over the said way or passage to the Defendant.

"(8.) The said way or passage was incident to the Defendant's grant under the indenture of December 14th, 1878, which recited the indenture of the 29th of June, 1878.

"(9.) Furthermore, there was at the time of the making of the indentures of the 29th of June, 1878, and of the 14th of December, 1878, an implied grant of the way or passage to the Defendant, and the said *J. Aston* and *G. L. Aston*." And lastly, the Defendant insisted that for the reasons aforesaid the Plaintiff was not entitled to the declaration or relief he asked.

The Plaintiff thereupon joined issue, and the action now came on for trial.

A plan of the property—of which plan the above is a reduced copy—was put in evidence; and it was in fact admitted by the Plaintiff that at the dates of the indentures of the 29th of June, 1878, and the 14th of December, 1878, the back-way was existing as shewn on the plan, with the two gates opening into the gardens of "*Cottisbrook*" and "*Westbourne*."

The plan also shewed, as the fact was, that "*Cottisbrook*" and "*Westbourne*" each had, in addition to the usual front or main entrance to the house, a side or tradesmen's entrance by an open passage about five feet wide from *Park Road*, leading up to a side door, which by one step upwards gave admission into a back hall or passage about four feet wide, paved with encaustic tiles, and communicating on one side with the entrance-hall of the house and on the other with the kitchen and other domestic offices. At the further end of this back hall or passage, a door opened by two descending steps into the back garden of the house. Beyond the

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kitchen and offices were a privy and midden; and the evidence shewed that in the absence of a right of way from *Augusta Road* to the garden and back premises of the house, the only mode of conveying manure, &c., into the garden, or of carrying away refuse from the back premises, was by going through the tiled passage or back hall of the house. The Plaintiff's surveyor admitted in cross-examination that the back-way was essential to the comfortable enjoyment of each of the two houses, as being the only convenient way by which manure could be taken into the garden, coals brought into the house, or the contents of the midden and privy removed.

Method, for the Plaintiff:—

There being no express grant to the Defendant or his predecessors in title of any right of way over our strip of land at the back of "*Normanhurst*," he must, in order to establish such a right, shew that he is entitled by implied grant to a "way of necessity"—that he has no other access to his land. But a way of necessity can only be claimed in the case of a tenement that is completely landlocked; and, except in the case of a way of necessity, no right to use ways which have been used and enjoyed in fact passes to a grantee of the land unless clearly so intended by the conveyance: *Corporation of London* v. *Riggs* (1); *Gayford* v. *Moffatt* (2); *Brett* v. *Clowser* (3); *Bolton* v. *Bolton* (4). Here "*Cottisbrook*"—and "*Westbourne*" is in a similar position—is not landlocked, for the Defendant has another way, though perhaps not quite so convenient, by which he can reach any part of his land, namely, the passage from *Park Road*. A way that is merely necessary for the convenient enjoyment of the thing demised, cannot be claimed as a way of necessity: *Pheysey* v. *Vicary* (5); *Gale* on Easements (6).

The grant by the lease of the larger plot, on which "*Cottisbrook*" and "*Westbourne*" stand, of "all ways, rights, easements, and appurtenances" does not carry this right of way as a way of convenience, for both the leases were granted to *Letts*; and all ways

(1) 13 Ch. D. 798.
(2) Law Rep. 4 Ch. 133.
(3) 5 C. P. D. 376, 383.
(4) 11 Ch. D. 968.
(5) 16 M. & W. 484.
(6) 5th Ed. pp. 137, 138.

of convenience are extinguished by unity of possession, except ways of necessity: *Shury* v. *Piggot* (1); *Gale* on Easements (2); and this is not a way of necessity.

[KAY, J.:—In *James* v. *Plant* (3), on the severance by deed of the unity of seisin of two tenements, a right of way over one of them which existed before the unity of seisin, and which was used during the unity of seisin, was held to pass by the deed.]

It was held to pass by the words "ways therewith usually held, used, or enjoyed," and the question was whether, upon the evidence, the particular way was in fact so held, used, or enjoyed. Here there are no such words.

Marten, Q.C., and *Horace Browne*, for the Defendant:—

First, we submit that not only was it the intention of *Letts* when he executed the assignment to us of the 14th of December, 1878, that a right of way over the strip of land which had been previously separated off by *Letts* himself for the express purpose of a road should pass, but that the right did in fact pass under the grant by that deed of all "rights, easements, and appurtenances": *Bayley* v. *Great Western Railway Company* (4); *Compton* v. *Richards* (5); *Kay* v. *Oxley* (6); for a man cannot derogate from his own grant: *Palmer* v. *Fletcher* (7).

[KAY, J., referred to *Watts* v. *Kelson* (8).]

Secondly, it being admitted by the Plaintiff's surveyor that this back-way is the only convenient way to the gardens and back premises of our houses, we say that even if this right of way did not pass under the general words, yet upon the severance by *Letts* of his unity of possession on the 14th of December, 1878, the date of our assignment, this right of way passed to us either as a way of necessity or by implied grant as a continuous and apparent easement necessary for the enjoyment and beneficial use and occupation of the property assigned: *Clark* v. *Cogge* (9);

(1) 3 Buls. 339.
(2) 5th Ed. p. 128.
(3) 4 Ad. & E. 749.
(4) 26 Ch. D. 434.
(5) 1 Price, 27.
(6) Law Rep. 10 Q. B. 360.
(7) 1 Lev. 122.
(8) Law Rep. 6 Ch. 166.
(9) Cro. Jac. 170.

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Hinchliffe v. *Earl of Kinnoul* (1); *Pyer* v. *Carter* (2), which was recognised as good law on this point by *Mellish*, L.J., in *Watts* v. *Kelson* (3); *Wheeldon* v. *Burrows* (4); *Langley* v. *Hammond* (5).

[KAY, J.:—*Ford* v. *Metropolitan Railway Companies* (6) is also a case in point.]

"When a man grants a thing he must be considered as granting that which is necessary in the proper sense of the word for the enjoyment of that which he grants, and he cannot derogate from his own grant; he cannot do that which will destroy or render less effectual that which he has granted": per *Cotton*, L.J., in *Russell* v. *Watts* (7); *Morris* v. *Edgington* (8). The question in such cases is whether there is existing at the time of the grant, not an easement strictly, but that which is in the nature of an easement, such as a way of necessity, or a right of support (9): *Shubrook* v. *Tufnell* (10). "By the grant of a ground, is granted a way to it; *i.e.*, all usual ways; and unless there be an usual way, then a way of necessity will pass": *Sheppard's* Touchstone (11). Upon the whole, we submit that on the execution of the assignment of the 14th of December, 1878, this right of way passed by implied grant, the way being then adapted for, used with and necessary for the proper enjoyment of the property thereby assigned.

Method, in reply:—

[KAY, J.:—There being this way with gates into it from "*Cottisbrook*" and "*Westbourne*," would not a right over it pass without any general words at all?]

No; unless it is a way of necessity.

[KAY, J.:—You have to convince me that the doctrine of implied grant is confined to ways of necessity strictly so called.]

On the severance of a heritage a grant will only be implied,

(1) 5 Bing. N. C. 1.
(2) 1 H. & N. 916, 921.
(3) Law Rep. 6 Ch. 166, 174.
(4) 12 Ch. D. 31.
(5) Law Rep. 3 Ex. 161.
(6) 17 Q. B. D. 12, 27, 28.
(7) 25 Ch. D. 559, 572.
(8) 3 Taunt. 24, 31.
(9) 25 Ch. D. 573.
(10) 46 L. T. (N.S.) 886.
(11) Page 89.

first, of the continuous and apparent easements in fact used by the owner during the unity; and, secondly, of those easements without which the severed portions could not be enjoyed at all. As to the first class of easements, a right of way cannot be a continuous or apparent easement, and as to the second, the easement must be absolutely necessary, as in the case of a land-locked tenement, which this is not: *Gale* on Easements (1). At the time of the assignment of the 29th of June, 1878, no right of way existed as an easement proper, there being a unity of possession of the properties comprised in both leases. The right could not pass either by the general words in the deed or by implied grant, it being neither a continuous and apparent easement, such as a watercourse, nor an easement of necessity: *Goddard* on Easements (2). A man cannot acquire a way of necessity over his neighbour's land, if he has any other means of access, no matter how inconvenient, to his own land: *Holmes* v. *Goring* (3); *Dodd* v. *Burchell* (4); *Proctor* v. *Hodgson* (5).

KAY, J.:—

This case raises a question of very considerable interest, which has been discussed in a great many authorities, several of which have been cited to me.

[His Lordship, after describing the three properties, "*Westbourne*," "*Cottisbrook*," and "*Normanhurst*," and the approaches to the gardens of the two first-mentioned properties from *Park Road* in front through the passage or back hall, and from *Augusta Road* by the back-way at the rear, said it was obvious that the passage or back hall was not intended for the removal of garden manure, or anything of that kind, and could not really be conveniently used for that purpose, and that at the date of the assignment of the 14th of December, 1878, by which "*Westbourne*" and "*Cottisbrook*" became vested in the Defendant, and of the assignment of the 13th of November, 1879, by which "*Normanhurst*" became vested in the Plaintiff's immediate predecessor in title, the back-way was the most convenient way, and an obviously intended conve-

(1) 5th Ed. pp. 25, 96.
(2) 2nd Ed. p. 99.
(3) 2 Bing. 76.
(4) 1 H. & C. 113.
(5) 10 Ex. 824.

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nience, for approaching the gardens of "*Westbourne*" and "*Cottisbrook*," and that it did not afford any communication whatever to the garden of "*Normanhurst*," which was completely walled off from it. His Lordship then stated the two last-mentioned assignments and the assignment in 1880 to the Plaintiff, and proceeded:—] So that the Plaintiff took, by conveyance, "*Normanhurst*," after "*Cottisbrook*" and "*Westbourne*" had been sold and conveyed to the Defendant. At the time the Defendant bought, this formed back-way was existing, and there were gates from it into the gardens both of "*Westbourne*" and "*Cottisbrook*."

Now, the question is, whether the conveyance to the Defendant, which contains nothing applicable to a right of way along this back-way, but the ordinary general words "rights, easements and appurtenances," passed a right of way through those gates from the gardens of "*Cottisbrook*" and "*Westbourne*" along this back-way into *Augusta Road*.

Of course at the time when the conveyance was made this right of way was in no sense an easement, because all three properties belonged to the same person; and the question divides itself into two—first of all, was this way a way of necessity? And, secondly, if it was not a way of necessity, could it be held to pass by implied grant?

Now, as a way of necessity I think it is difficult to support it, for the following reason. A way of necessity is not a defined way. A way of necessity is a way which is the most convenient access to a land-locked tenement over other property belonging to the grantor; and it is quite clear that the grantor has a right himself to elect in which line, in which course, the way of necessity should go. Here, there is no case of election. The claim is to a way over this particular road, without any right of election at all on the part of the grantor. That of itself would be enough to shew it is not a way of necessity. But there is also this consideration; if it be a way of necessity, then, whether it had been formed or not, the way would pass over the ground of "*Normanhurst*"; that is to say, supposing there had been no back way and the gardens of "*Westbourne*" and "*Cottisbrook*" had been completely shut off from communication with any road except through the passages in these houses, the tiled passages which I have

described, if the purchasers of "*Cottisbrook*" and "*Westbourne*" were entitled to ways of necessity, it must follow that "*Westbourne*," which is the most eastern of these properties, would be entitled to a way of necessity over the ground of "*Cottisbrook*," and over the ground of "*Normanhurst*," and that "*Cottisbrook*," which is the middle one, would be entitled to a way of necessity over the ground of "*Normanhurst*." To my mind it is clearly impossible so to hold, because, if any one had bought "*Westbourne*" or "*Cottisbrook*" without any access over the ground of "*Normanhurst*" to *Augusta Road*, but only with access to the garden by means of a tiled passage, it seems to me quite impossible to say that he should also have over the adjoining land, which was then a garden laid out as the garden of the house, a way in some direction or another into *Augusta Road*. Therefore I am clearly of opinion that this is not a way of necessity.

Then comes the question whether, even if it be not a way of necessity, it may not pass under the doctrine of an implied grant of a continuous and apparent easement. It is said, and forcibly, that a right of way is not a continuous and apparent easement, and for that is cited a passage from Mr. *Gale's* well-known book; but no other authority has been cited.

Let us see how the law stands. In the case of *Hinchliffe* v. *Earl of Kinnoul* (1) part of the tenement granted consisted of a coal shoot and of certain pipes, and Lord Chief Justice *Tindal* said (2): "We cannot therefore feel any doubt, but that under the description contained in the lease, the coal shoot and the several pipes passed to the lessee as a constituent part of the messuage or dwelling-house itself."

In that case there was over an adjoining tenement of the lessor a passage by which this coal shoot and the pipes could be approached, and the jury found in their verdict that the passing and re-passing over that way or passage was not merely convenient but necessary "for the use of the coal shoot, and of the pipes, and of the repairing and amending the same, and the side or wall of the house." Upon that the judgment proceeds (3): "Since, therefore, as it appears to us, the right in question" (that is the

(1) 5 Bing. N. C. 1. (2) 5 Bing. N. C. 24.
(3) 5 Bing. N. C. 25.

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right of passing to and from this coal shoot and pipes) "passed to the lessees under the reversionary lease of 1819, as incidental to the enjoyment of that which was the clear and manifest subject matter of demise, it becomes unnecessary to consider the question argued at the bar before us, how far the same right might or not pass to the lessees under the express words used in the lease itself, as 'an appurtenant unto the said piece or parcel of ground, messuage or tenement, erections, buildings, and premises, belonging or appertaining.' There are strong authorities in the law books to shew these words capable of a wider interpretation, and of carrying more than is *an appurtenant* in the strictly legal sense of that word, where such interpretation is necessary in order to give that word some operation." The learned Judge refers to the cases and then says: "But we think it at once sufficient, and at the same time safer, to rely upon the ground on which we have already held that the right claimed by the plaintiff may be supported, and to give no opinion on this second point." That case has been followed and commented on in a great many subsequent cases.

The rule laid down in *Sheppard's* Touchstone (1) is that, by the grant of anything, "*conceditur etiam et id sine quo res ipsa non esse potuit.*" That seems to be really the case of a way of necessity.

In *Langley* v. *Hammond* (2) there was a surrender by a lessee to his lessor of part of the demised premises, "together with all ways, &c., therewith now used, occupied, and enjoyed;" and in that case Lord *Bramwell's* words, which have been referred to in subsequent cases, were these (3): "Suppose a house to stand 100 yards from a highway, and to be approached by a road running along the side of a field, used for no other purpose, but only fenced off from the field, which I assume to be the property of the owner of the house. I should wish for time to consider before deciding that on the conveyance of the house the right to use that road, not being a way of necessity, would not pass under such words as these." Those words being, as I have said, "therewith now used, occupied, and enjoyed." That was the point which was raised in the well-known case of *James* v. *Plant* (4).

(1) Page 89.
(2) Law Rep. 3 Ex. 161.
(3) Law Rep. 3 Ex. 170.
(4) 4 Ad. & E. 749.

In the later well-known case of *Watts* v. *Kelson* (1) Lord Justice *Mellish*, in delivering judgment, said (2): "We may also observe that, in *Langley* v. *Hammond* (3), Baron *Bramwell* expressed an opinion, in which we concur, that even in the case of a right of way, if there was a formed road made over the alleged servient tenement, to and for the apparent use of the dominant tenement, a right of way over such road might pass by a conveyance of the dominant tenement with the ordinary general words." I think there is a mistake there: the words before Lord *Bramwell* were not the ordinary words, but were extraordinary general words such as those used in *James* v. *Plant* (4).

In an earlier authority—*Pearson* v. *Spencer* (5)—the case is thus stated in the head-note: "Where the owner of a farm divided it by his will into two portions, devising them to *A.* and *B.* respectively, and the portion of *B.* was landlocked, so that in order to reach it it was necessary that he should have a right of way over the property of *A.*, and the devisor during his life had used a way in a certain direction over that property: held, affirming the decision of the Queen's Bench, that a right to use that way passed to *B.* by the devise."

Now I pause there to say that this is distinctly an advance of the doctrine. That particular way was not of course necessarily a way of necessity. It was not held that a way of necessity passed, but that this particular way passed, and the ground of the judgment given by Chief Justice *Erle* is this (6): "We have been much struck with the argument of Mr. *Mellish*, in which he contended that, if this right of way were taken as a right of way of necessity simply, the way claimed by the defendant could not be maintained; because we are inclined to concur with him that a way of necessity, strictly so called, ends with the necessity for it, and the direction in which the plaintiff says the way ought to go would so end. But we sustain the judgment of the Court below on the construction and effect of *James Pearson's* will taken in connection with the mode in which the premises were enjoyed at the time of the will. The testator had a unity of possession

(1) Law Rep. 6 Ch. 166.
(2) Ibid. 174.
(3) Law Rep. 3 Ex. 161.
(4) 4 Ad. & E. 749.
(5) 3 B. & S. 761.
(6) Ibid. 767

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of all this property; he intended to create two distinct farms with two distinct dwelling-houses, and to leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of a way to it, and we think the way in question passed with that devise. It falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependance*, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement. There are rights which are implied, and we think that the farm devised to the party under whom the defendant claims could not be enjoyed without dependance on the plaintiff's land of a right of way over it in the customary manner." There is the distinct decision of the Court of Exchequer Chamber that a way in a particular defined route which is not a way of necessity may, nevertheless, pass by implied grant—implied grant, that is, by the owner who has unity of possession both of the close granted and of the adjoining close over which that particular way passed.

In *Wheeldon* v. *Burrows* (1), as is well known, the Court of Appeal drew a distinction on the much-contested question what rights were reserved to a grantor, and the distinction, as taken in the language of Lord Justice *Thesiger*, which has been much considered and approved of by other Judges, and which has been often quoted since, is this (2): "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi*-easements)"—and the interpretation there interposed is necessary, because, where the owner of two tenements grants one of them, there can be no easement at the moment of the grant over the other tenement, the two tenements having

(1) 12 Ch. D. 31. (2) 12 Ch. D 49.

belonged to one and the same person, and an easement being a right over the land of somebody else—"or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." That is the broad distinction which has been recognized, as far as I know, ever since, between the implied grant of an easement and the reservation of an easement.

In the case of *Bayley* v. *Great Western Railway Company* (1) the point came before the Court of Appeal. That was a case where the railway company had purchased a piece of land on which was a stable, and by the conveyance to the company the premises were granted "with all rights, members or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member thereof." The vendor had many years previously made a private road from the highway into the stable over his own land for his own convenience, and had used it ever since. The soil of the road was not conveyed to the company, and no express mention of it was made in the conveyance, and it was held that, notwithstanding the unity of possession of the stable and private house, the right of way passed to the company under the general words of the conveyance. In that case Lord Justice *Bowen* says this (2): "This particular case is not a case of a way of necessity, though I do not say that there might not be ways which would pass by implication as ways of necessity, even if they were only reasonably necessary and not physically necessary." I do not mean to rely in the least on that dictum, because, as I have said, here we have not got the case of a way of necessity.

But there is another authority of *Ford* v. *Metropolitan Railway Companies* (3), which was before the Court of Appeal. The case is thus stated in the head-note: "A house was divided into a front and a back block: and the plaintiffs were lessees of three rooms on the first floor in the back block. The lease did not

(1) 26 Ch. D. 434. (2) 26 Ch. D. 453. (3) 17 Q. B. D. 12.

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expressly grant any mode of access. Access to the rooms demised to the plaintiffs was gained from the street by passing through a hall or vestibule, and then up some stairs to the plaintiffs' rooms. The defendants, in the exercise of compulsory powers under the *Railways Clauses Consolidation Act*, took down the front block of the house and removed the hall. The interference with the hall and the injury to the access to the rooms of which the plaintiffs were lessees, lessened their value. An arbitrator having awarded compensation to the plaintiffs under the *Lands and Railways Clauses Consolidation Acts*:—Held, that the award was valid on the grounds, first, that compensation may be obtained under the *Railways Clauses Consolidation Act*, 1845, for injury done to land by the execution of the works, if it is sufficient to lessen the value thereof; secondly, that the access through the hall was not a way of necessity, but was in the nature of a continuous and apparent easement which passed under the demise of the rooms, and that an interference with this *quasi*-easement was sufficient to give rise to a valid claim for compensation."

That was not a case which depended upon any extraordinary general words like "used and enjoyed;" but the Court, on looking at the surrounding facts, found there was a formed mode of access through other property adjoining belonging to the grantor, and accordingly came to the conclusion that there was an implied grant of that particular formed mode of access, although there were no special words referring to it, and no general words which could extend the grant, like the words "usually held and enjoyed therewith." Indeed it has been doubted—and on that there seems to be a present conflict of authority—whether those words "usually held and enjoyed" have any effect in a matter of this kind; because Lord *Romilly*, M.R., in *Thomson* v. *Waterlow* (1), said the question was, whether you could, by those words, create an easement. That doubt of his is commented upon in *Kay* v. *Oxley* (2) by Lord *Blackburn*, who says (3), "But I cannot agree that, upon the construction of words like those in the conveyance here in question, they cannot as a matter of law create a right of way that did not previously exist as a right."

(1) Law Rep. 6 Eq. 36. (2) Law Rep. 10 Q. B. 360.
(3) Law Rep. 10 Q. B. 367.

I leave that contest where it is; but it seems to me that the law is this—that a particular formed way to an entrance to premises like these, "*Westbourne*" and "*Cottisbrook*," which leads to gates in a wall, part of these demised premises, and without which those gates would be perfectly useless, may pass, although in some sense it is not an apparent and continuous easement; or rather, may pass—because, being a formed road, it is considered by the authorities, in cases like this, to be a continuous and apparent easement—by implied grant without any large general words, or indeed without any general words at all.

Here I have a case in which these two gardens, although they are not absolutely inaccessible, are inaccessible except through a part of the house, unless they are to be reached by the gates at the bottom of the gardens communicating with this formed back-way. That it was intended, looking at all the facts, that the persons to whom "*Westbourne*" and "*Cottisbrook*" were conveyed should have the use of those two gates and of this back-way, is, to my mind, beyond all doubt. Then, although I agree that it is not for all purposes a way of necessity, do I want any express grant? It seems to me to be clear on the authorities that an express grant is not wanted in such a case as this.

Therefore I hold that the right to use this back-way in the same mode as it was usable by the occupiers of "*Cottisbrook*" and "*Westbourne*" at the time of the grant of these properties did pass by implied grant, and accordingly this case must be decided on that footing. The Plaintiff, the present owner of "*Normanhurst*," seeks a declaration that the Defendant is not entitled to have a right of way. I cannot make that declaration; on the contrary, I make the declaration that the Defendant is entitled to the right of way as I have described it, and the Plaintiff must pay the costs of the action.

Solicitors: *R. Jenkins*, for *F. Perry, Birmingham; Durton, Yeates & Co.*, for *E. M. Beloe, King's Lynn.*

NOTE:—See *Thomas* v. *Owen*, 20 Q. B. D. 225.

G. I. F. C.

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Dec. 6.

1888

Jan. 12.

In re LAND DEVELOPMENT ASSOCIATION.

KENT'S CASE.

Company—Shares—Payment in Cash—Agreement to apply Debt due from Company to Shareholder in Payment of future Calls—Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628].

K., being a shareholder in a company whose directors were empowered to receive from shareholders payments in advance of future calls, purchased a debt due from the company and requested the directors to apply a sufficient part of the debt in paying up his shares in full. The directors passed a resolution that the debt should be so applied. Nothing further was done to carry the transaction into effect, there was no entry in reference to it in the books of the company other than the minute of the resolution, nor was any contract registered as to the shares within sect. 25 of the *Companies Act*, 1867.

In the subsequent winding-up of the company:—

Held, that the transaction between *K.* and the directors, not having been carried into effect by any entry in the books of the company shewing that the shares had been paid up, or by any other step beyond the resolution, was not equivalent to payment in cash within the last-mentioned section, and that *K.* was therefore liable for calls made in the winding-up in respect of the shares.

Ferrao's Case (1) distinguished.

ADJOURNED SUMMONS.

The articles of association of the *Land Development Association, Limited*, provided by art. 11 as follows:—The directors may, if they think fit, receive from any member willing to advance the same, all or any parts of the moneys due upon the share or shares held by him, beyond the sums actually called for.

The Respondent, *Horace Kent*, was the holder of upwards of 800 shares of £10 each in the company.

The company were indebted to *W. Eichholz* in the sum of about £16,000. *Kent* agreed to purchase this debt from *Eichholz*.

On the 13th of March, 1886, *Kent*, as a creditor of the company, presented a petition for the winding-up of the company, but such petition was not advertised, and was withdrawn on the 17th of April, 1886.

On the 2nd of April, 1886, the purchase from *Eichholz* was

(1) Law Rep. 9 Ch. 355.

completed, and at a meeting of the directors of the company on that day it was resolved "that the seal of the Association be affixed to the assignment from Mr. *W. Eichholz* to Mr. *Horace Kent* of the Association's indebtedness to Mr. *W. Eichholz* as expressed therein."

On the same day *Kent* wrote to the directors a letter, as follows: "Gentlemen,—I request you to transfer from the amount due from the Association to me in respect of the debt assigned by Mr. *Eichholz* to me a sum sufficient to pay up in full the shares standing in Mr. *W. Shurly's* name in the books of the Association, and also the shares standing in my name in the said Association except those this day transferred by me to Mr. *H. B. Dry*."

And on the same day the directors passed a resolution as follows: "Resolved that the debt assigned by Mr. *Eichholz* to Mr. *Kent* as aforesaid be applied to paying up in full the shares mentioned in Mr. *Kent's* letter of this date."

Except the minutes of the resolutions so passed, there was no entry in the books of the company in reference to the transaction, or shewing that the shares held by *Kent* had been paid up, nor was any contract in writing in reference to the shares, within the 25th section of the *Companies Act*, 1867, filed with the Registrar of Joint Stock Companies.

On the 5th of April, 1886, a petition for the winding-up of the company was presented by another creditor, and on the 20th of April, 1886, an order was made on this petition for the winding-up of the company.

Kent's name having been placed upon the list of contributories, this summons was taken out by the official liquidator to enforce the payment by *Kent* of a call of £811 made in the winding-up in respect of the shares held by him.

Marten, Q.C., and *Vernon Smith*, for the official liquidator, in support of the summons:—

The transaction between *Kent* and the directors did not amount to payment in cash for his shares within sect. 25 of the *Companies Act*, 1867. Moreover, the transaction, having been entered into while the petition by *Kent* for the winding-up of the company

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was pending, cannot be supported: *Companies Act*, 1862 (25 & 26 Vict. c. 89), s. 164.

The Respondent, *Kent*, in person:—

The shares are fully paid up. By the letter of the 2nd of April, 1886, and the resolution of the directors following thereon, a minute of which was duly entered in the minute book, there was a complete appropriation of a sufficient part of the debt due from the company in payment of the future calls, and a valid and effectual set-off of the debt against such calls: *Williams* on Bankruptcy (1); *Rose* v. *Hart* (2); *Bailey* v. *Finch* (3); *Bankruptcy Act*, 1883 (46 & 47 Vict. c. 52), s. 38; *Companies Act*, 1862, s. 67. The transaction thus entered into, and recorded in the books of the company, was equivalent to payment in cash in respect of the shares within the principle of *Ferrao's Case* (4) and *Spargo's Case* (5) so as to satisfy the provisions of sect. 25 of the *Companies Act*, 1867.

KAY, J.:—

In this case, which has been very well argued, the point raised is a very short one. The facts, as I understand them, are as follows. The Respondent, Mr. *Kent*, being a holder of shares in this company, purchased a debt due by the company to a Mr. *Eichholz*, and agreed with the directors of the company that the debt which he had so purchased should be applied, as under the articles of association it might be applied, not in payment of calls that had been made upon his shares, but in paying up his shares in full in anticipation of any calls that might be made. It is clear that such a transaction could not come within any doctrine of set-off. It is essential to the existence of a right of set-off that there should be debts on both sides; that is, in this case, a debt due from the company to Mr. *Kent*, and a debt due from him to the company. There was no debt due from him to the company. What he wanted to do was not to pay any debt due from him to the company, but to anticipate possible calls, which might never

(1) 4th Ed. p. 112 *et seq.*
(2) 8 Taunt. 499; 2 Sm. L. C. 9th Ed. p. 324.
(3) Law Rep. 7 Q. B. 34.
(4) Ibid. 9 Ch. 355.
(5) Ibid. 8 Ch. 407.

be made at all if the company was prosperous. It was clearly necessary that an arrangement of that kind between him and the directors should be carried out by some formal proceeding. What took place was that Mr. *Kent* on the 2nd of April, 1886, wrote to the directors as follows:—[His Lordship read the letter of that date and continued:—] That is a request that part of this debt should be applied in payment up in full of the shares which are mentioned. On the same day, there being three directors present, at a board meeting this resolution was passed:—[His Lordship read the second resolution of the 2nd of April, 1886.] There I find perfect *primâ facie* evidence of an agreement between the directors and Mr. *Kent* that a sufficient part of the debt of Mr. *Eichholz* which he had bought should be applied in paying up his shares in anticipation of calls which might thereafter be made. The question is, was that payment? There was no entry in the books of the company shewing that the shares had been paid up, and nothing except what I have read was done to carry out the arrangement entered into between Mr. *Kent* and the directors. It appears that the winding-up occurred very soon afterwards, and the books were taken away by the liquidator. Practically, nothing further was done in the matter. In my opinion the transaction was not payment, but only an agreement that the debt should be applied in payment. I am referred to *Ferrao's Case* (1), which confirms me in the opinion I have formed. In *Ferrao's Case* what was done was this. A Mr. *Webb* had brought an action against the company which was compromised, and a judge's order was made by consent; the terms being that the company were to pay *Webb* £3900, whereof £3200 was to be paid by bills of exchange, and the company were to credit fifty shares standing in the name of *Ferrao* with £700 so as to make the same fully paid up. If the case had stopped there, there would have been merely a contract and not payment. But the case did not stop there. Entries to that effect were accordingly made in the books of the company. Then there followed the winding-up order, and *Mellish*, L.J., in his judgment, after referring to the Judge's order, said this (2):—"In my opinion, the moment the company, in pursuance of that Judge's order, did credit the

(1) Law Rep. 9 Ch. 355. (2) Law Rep. 9 Ch. 357.

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shares of *Ferrao* with the £700 so as to make them fully paid-up shares, that moment the £700 was paid by the company to *Webb* just as much as if it was paid in cash." He does not say—"the moment the Judge's order was made,"—the Judge's order was merely a contract—but the moment the contract was carried out by crediting the shares with the £700 in the company's books. And that is made more clear by what he says later on in the judgment. "It is exactly the same thing as if *Webb* had gone to the company and the company had handed over to *Webb* £700 in bank notes, and then *Webb* had said, 'I wish to pay up the shares of my friend *Ferrao*; there is the £700 in bank notes back again.' There was no need to go through that form; and, in my opinion, writing it off in the books is perfectly equivalent to payment." Beyond all question the *ratio decidendi* was not that the contract was a sufficient payment, but that the actual writing off the amount in the books of the company was equivalent to payment; that is, that it was not necessary to go through the form of handing the money over and handing it back again. That is exactly the point in which this case fails to be equivalent to *Ferrao's Case* (1). Here there was nothing but the agreement with the directors which was not carried out by any entry in the books or in any other way whatever. Then of course comes in the *Companies Act*, 1867, which enacts by sect. 25 that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." Nothing of that kind has been done. The agreement, even if it would otherwise satisfy the terms of the statute, has not been registered. Therefore, I am afraid that on this ground I must hold this gentleman liable for the calls made in the winding-up in respect of the shares held by him.

Solicitors: *Badham & Williams; H. C. Morris.*

C. C. M. D.

(1) Law Rep. 9 Ch. 355.

In re MOSS'S TRUSTS.

KAY, J.

1888

Feb. 4.

Trustee Acts—Appointment of separate Set of Trustees of Part of Property held upon Distinct Trusts—Practice—Petition—Reference to Sections of Acts under which Application made—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *s.* 32 [*Revised Ed. Statutes, vol. x., p.* 990]—*Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 5.

Independently of sect. 5 of the *Conveyancing Act*, 1882, the Court has power under the *Trustee Acts* to allow trustees to retire from the trusts of a part of the trust property, held upon trusts distinct from those affecting the remainder, and to appoint a separate set of trustees of such part.

Savile v. *Couper* (1) considered.

Petitions under the *Trustee Acts* should contain a statement indicating the particular sections of the Acts under which the Court is asked to make an order.

PETITION.

John J. Moss, who died on the 23rd of February, 1887, by his will, dated the 1st of April, 1879, appointed *S. F. Widrington*, *R. J. Cust*, and Sir *C. L. Cust* trustees and executors thereof, and bequeathed to them two sums of £8000 upon trust to invest the same and pay the income to *G. D. Bourne* during his life, and after his death to appropriate one sum of £8000, or the investments representing that sum, as a portion for *Hannah M. Bourne*, to be held upon certain trusts for her for life and after her death for her issue, and to appropriate the other sum of £8000, or the investments representing that sum, as a portion for *Louisa Bourne*, to be held upon similar trusts for her for life, and after her death for her issue, and the testator directed that in default or on failure of issue of *Hannah M. Bourne* and *Louisa Bourne*, the said sums of £8000 and the investments representing the same respectively, should respectively sink into his general personal estate. The testator devised all his freehold estates to the use of Sir *C. L. Cust*, for his life, with remainder to his first and other sons in tail, with remainder to *B. O. Cust* for life, with like remainder to his sons, with remainder to *L. P. F. Cust* for life, with like remainder to his sons, with remainder to *P. E. L. Cust* for life, with like remainder to his sons, with remainder to the testator's own right

(1) 36 Ch. D. 520.

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heirs. The will contained the usual powers of sale, with the usual declaration that any moneys to arise by any sale should be invested in the purchase of hereditaments to be settled to the like uses, and the testator bequeathed all the residue of his personal estate, after payment thereout of his debts and legacies, to his trustees upon the trusts before declared concerning the moneys to arise from the sale of the hereditaments thereby devised, under the power of sale before declared. The will contained a power for the surviving or continuing trustees or trustee for the time being to appoint a new trustee or new trustees in the place of any trustee or trustees desiring to be discharged, or refusing or becoming incapable to act.

Sir *C. L. Cust* renounced and disclaimed the offices of executor and trustee under the will; and *S. F. Widrington* and *R. J. Cust* alone proved the will.

P. E. L. Cust died in the testator's lifetime unmarried.

Hannah M. Bourne, *Louisa Bourne*, Sir *C. L. Cust*, *B. O. Cust*, and *L. P. F. Cust* were respectively unmarried.

The two sums of £8000 were raised and appropriated, and were now represented by two sums of £7540 16*s.* 1*d.* and £7540 16*s.* consols.

The trusts of the portions of £8000 were likely to continue for many years, and were of a complicated character, and *S. F. Widrington* and *R. J. Cust* were desirous of being relieved from those trusts, but were willing to continue trustees for the purposes of the real estate and residuary personal estate.

This petition was presented by Sir *C. L. Cust*, *B. O. Cust*, *L. P. F. Cust*, *G. D. Bourne*, *Hannah M. Bourne*, *Louisa Bourne* and Sir *T. E. Moss*, who was the testator's heir-at-law, praying that two persons named might be appointed trustees of the will for the purposes of the two portions of £8000; that *S. F. Widrington* and *R. J. Cust* might be at liberty to transfer the sums of £7540 16*s.* 1*d.* and £7540 16*s.* consols to the new trustees; and that *S. F. Widrington* and *R. J. Cust* might be re-appointed or might continue trustees of the will for all purposes other than the trusts of the two sums of £8000.

The petition contained no statement indicating the particular sections of the *Trustee Acts* under which it was proposed that the

order asked for should be made, and upon the petition being brought on his Lordship referred to a recommendation made recently (viz., on the 7th of November, 1887) by the Court of Appeal, that all petitions under the *Trustee Acts* should contain such a statement in the last paragraph, and said that it would be convenient if that recommendation was generally observed.

Marten, Q.C., and *Cust*, for the Petitioners:—

In *Savile* v. *Couper* (1) Mr. Justice *North* held that sect. 5 of the *Conveyancing Act*, 1882, does not enable the existing trustees of the whole of a trust property to retire from the trusts as to part by means of an appointment of new trustees of that part. The difficulty, if any, caused by that decision, may be overcome by now appointing a new trustee for the general purposes of the will in the place of the trustee who has disclaimed.

[KAY, J.:—That would be a mere device to evade the effect of the decision of Mr. Justice *North*, which I must treat as binding upon me, even if I should have been inclined to give a wider interpretation to the section.]

In re Hetherington's Trusts (2) was a case very similar to the present, and there it was held that there was power to appoint separate sets of trustees for different parts of the property.

[KAY, J.:—In that case new trustees of the whole were appointed.]

Independently of sect. 5 of the *Conveyancing Act*, 1882, the Court has power, under sect. 32 of the *Trustee Act*, 1850, to appoint a separate set of trustees for a part of the trust property held upon distinct trusts, and this power was exercised in the cases of *In re Cotterill's Trusts* (3) and *In re Cunard's Trusts* (4). The decision of Mr. Justice *North* in *Savile* v. *Couper* was merely upon an originating summons asking the opinion of the Court as to the power of the trustees under sect. 5 of the *Conveyancing Act*, 1882, and the order which is now asked for under sect. 32 of the *Trustee Act*, 1850, would not be in any way inconsistent with that decision.

(1) 36 Ch. D. 520.
(2) 34 Ch. D. 211.
(3) W. N. 1869, p. 183.
(4) 48 L. J. (Ch.) 192; 27 W. R. 52.

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F. H. L. Errington, for the Respondents, the trustees of the will.

KAY, J. :—

I think I may do what is now asked, and that in the present case I am not acting inconsistently with the decision of Mr. Justice *North* in *Savile* v. *Couper* (1). This application for the appointment of trustees is made under the *Trustee Acts*, and it seems from the cases which have been cited to me that even before the *Conveyancing Act*, 1882, the Court was accustomed to allow trustees to retire from a part of the trusts, and to appoint new trustees of that part whenever it was expedient so to do. Here, therefore, I think I am at liberty under the powers of the *Trustee Acts*, independently of sect. 5 of the *Conveyancing Act*, 1882, to allow these trustees to retire from that part of the trusts which has reference to the portions, and which is quite distinct from the other part of the trusts having reference to the residue of the property; and I do so without requiring the appointment of a new trustee to act in the trusts of the residue, because I do not wish in any way to limit the power of the Court. The decision of Mr. Justice *North* in *Savile* v. *Couper*, as I understand it, was that under the powers given by sect. 5 of the *Conveyancing Act*, 1882, or under a power of appointing new trustees such as that which is contained in the will of this testator, trustees are not at liberty without the authority of the Court to retire from one part only of the trusts, and appoint new trustees of that part to act in their place. But that is a very different thing from an appointment with the authority of the Court under the *Trustee Acts*. I think, therefore, that I am at liberty to make the order which is asked for by this petition, but the petition must be amended by inserting a reference to sect. 32 of the *Trustee Act*, 1850.

Solicitors: *Ingram, Harrison, & Ingram.*

(1) 36 Ch. D. 520.

C. C. M. D.

In re NATT.
WALKER *v.* GAMMAGE.

[1887 N. 54.]

NORTH, J.
1888
Jan. 17, 18.

Administration—Personal Estate—Intestacy—Next of Kin—Grandchildren—Per Stirpes or per Capita—Statute of Distributions (22 & 23 *Car.* 2, *c.* 10), *ss.* 3, 5, 6, 7 [*Revised Ed. Statutes, vol. i. pp.* 767, 768].

A share of the residuary estate of a testatrix (a widow), which she had given by her will, lapsed. She had had only two children, a son and a daughter, both of whom died before her. Three children of the son, and one child of the daughter, survived the testatrix:—

Held, that, under the *Statute of Distributions*, the four grandchildren took the lapsed share, so far as it arose from personal estate, *per stirpes* not *per capita*.

Under the *Statute of Distributions* the division of personal estate among descendants of an intestate is always to be *per stirpes*.

The term "next of kindred" in sect. 7 of the statute does not include the issue of children of the intestate, but children and their descendants are all included under the term "children," which means children living at the death of the intestate either themselves or in their descendants.

Lockyer v. *Vade* (1) followed.

Williams on Executors (2) dissented from.

ORIGINATING SUMMONS by the trustees and executors of *Sarah Natt* (widow), who died on the 25th of March, 1879, raising some questions with regard to one-sixth share of her residuary estate, devised and bequeathed by her will dated the 1st of December, 1875. The first question was, whether the one-sixth share of the residue had lapsed, and the Court held that it had. The other questions were, whether the share, so far as it consisted of real estate or the proceeds of the sale thereof, devolved on the heir-at-law of the testatrix; whether the share, so far as it consisted of personal estate, devolved on her next of kin; and, whether such next of kin took *per stirpes* or *per capita*.

The testatrix was twice married. The name of her first husband was *John Bassett*. She had no children by her second husband. By her first husband she had only two children—viz., *Henry*

(1) Barnardiston, Ch. 444. (2) 8th Ed. vol. ii. p. 1503.

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John Bassett and *Sarah Underhill*, who became the wife of *George Collin*. They both died before the testatrix.

Henry John Bassett had five children, three only of whom survived the testatrix—viz., Mrs. *Head*, *Harry Bassett*, and *James Bassett*. *Harry Bassett* was the heir-at-law of the testatrix, Mrs. *Collin* had two children, one only of whom, *G. N. Collin*, survived the testatrix.

G. N. Collin died on the 20th of April, 1886, a bachelor.

Marcy, for the Plaintiffs:—

The principal question for determination is, whether the one-sixth share of the residue, so far as it consisted of personal estate, devolved on the four grandchildren *per stirpes* or *per capita*, and this depends on the construction of the *Statute of Distributions*. The only recent authority bearing on the question is *In re Ross's Trusts* (1), in which, there being living grandchildren and great grandchildren of an intestate of different stocks, but no children, Vice-Chancellor *Wickens* held that the division of the personal estate must be *per stirpes*.

R. F. Norton, for the children of *Henry John Bassett*:—

The next of kindred being all of the same degree, the division must be *per capita*. That is the true construction of sect. 7 (2) of the Act.

(1) Law Rep. 13 Eq. 286.

(2) Sect. 3 provides that the Judges "shall make just and equal distribution of what remaineth clear (after all debts . . . first allowed and deducted) amongst the wife and children, or children's children, if any such be, or otherwise to the next of kindred to the dead person in equal degree, or legally representing their stocks; *pro suo cuique jure*, according to the laws in such cases, and the rules and limitation hereafter set down."

Sect. 5 provides that the distribution is to be "in manner and form following: that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions, to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead," with a provision that, in case of children having been advanced by portions in the lifetime of the intestate, their portions shall be brought into hotch-pot.

Sect. 6 provides, "and in case there be no children nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to

The latter clause of sect. 7 exactly meets the present case. The only authority at all in point is *In re Ross's Trusts* (1), but that only decides that, when descendants of an intestate are in different degrees, they take by representation *per stirpes*. If there is representation at all, all the persons who take take by representation.

But in the present case there is no necessity for representation; all the next of kindred, being in the same degree, take in their own right. The statute lets in grandchildren by representation only in a case in which otherwise they would take nothing at all. So far as the judgment of Vice-Chancellor *Wickens* in *In re Ross's Trusts* is opposed to my argument it was not necessary for the decision of that case. The text-books are divided on this point. *Williams* on Executors (2) (following *Toller* on Executors) says, that, where the children of an intestate are all dead, all of them having left children, "all his grandchildren shall have an equal share," and that this would also be the case if there were only great grandchildren of the intestate living at his death. But the cases cited in support of this view related only to collaterals. In *Watkins* on Descents (3) the same view is adopted. On the other hand in *Burton's* Compendium (4) it is suggested that in the case of descendants of an intestate the division should in every case be *per stirpes*, and the late Mr. *Joshua Williams* in his note to *Watkins* on Descents (5) also adopted that view.

F. L. Wright, for the representative of *G. N. Collin*:—

In *Lockyer* v. *Vade* (6), a case the facts of which were precisely similar to those of the present case, Lord *Hardwicke*, after argument, expressed his opinion in favour of a *per stirpes* division,

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every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them."

Sect. 7: "Provided that there be no representations admitted among collaterals after brother's and sister's children: and in case there be no wife, then all the said estate to be distributed equally to and amongst the children: and in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid, and in no other manner whatsoever."

(1) Law Rep. 13 Eq. 286.
(2) 8th Ed. vol. ii. p. 1503.
(3) 4th Ed. p. 259.
(4) 7th Ed. p. 438, plac. 1403, n.
(5) 4th Ed. p. 259, n.
(6) Barnardiston, Ch. 444.

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though he would not finally decide the case until it should appear from the result of an inquiry by the Master whether there was any fund for division among the grandchildren. The same view is adopted by Mr. *Hargrave*, Jurisconsult Exercitations (1).

[He was stopped by the Court.]

Bunting, for the heir-at-law of the testatrix.

NORTH, J.:—

I observe that Lord *Hardwicke* in *Lockyer* v. *Vade* (2) said that upon the opening of the cause "he inclined to be of a contrary opinion" from that which he expressed at the close of the hearing, viz., that, there being grandchildren living at the death of an intestate, but no children, the grandchildren should take *per stirpes*. I must confess that when this case was first opened I also was inclined to think that the rule was as it is stated in *Williams* on Executors. But on further consideration I have come to the conclusion that it is not so, and I think that *In re Ross's Trusts* (3) is really an authority to the contrary. I think that sect. 3 of the Act points out distinctly a difference between the "wife and children, or children's children, if any such be," of the dead man, and his "next of kindred." I read the words "children's children" as meaning "issue of children," and I think that section distinguishes clearly between children and descendants of children, on the one hand, and "next of kindred," on the other hand. Then sect. 5 provides that the distribution is to be as follows, one third to the wife of the intestate, and the residue equally amongst the children and "such persons as legally represent such children, in case any of the said children be then dead." It was decided long ago that the persons who "legally represent" the children are their descendants in any degree. I think the words "in case any of the said children be then dead" apply to the case of an only child being dead. The effect, therefore, of sect. 5, putting it shortly, is to give one third of the surplus of the estate to the wife of the intestate and the other two thirds equally among his children, and such

(1) Vol. i. p. 271. (2) Barnardiston, Ch. 444.
(3) Law Rep. 13 Eq. 286.

persons as legally represent the children, in case any of them be then dead. Then sect. 6 provides for the case of an intestate leaving a wife, but "no children, nor any legal representatives of them," that is, no children living in themselves or in their descendants. In that case half of the surplus is allotted to the wife, and the other half is "to be distributed equally to every of the next of kindred of the intestate who are in equal degree, and those who legally represent them." Then comes sect. 7, which (omitting the first proviso) provides that, "in case there be no wife," all the estate is "to be distributed equally to and amongst the children: and, in case there be no child, then to the next of kindred in equal degree of or unto the intestate, and their legal representatives as aforesaid." The proviso at the beginning of sect. 7 is, "provided that there be no representations admitted among collaterals after brother's and sister's children." I think that proviso is really an appendix to both sect. 6 and sect. 7, and that the two sections would read more clearly if the proviso were placed at the end of sect. 7, and the two sections were then read as one. Sect. 6 provides for the case of an intestate leaving a wife, but leaving no children, either living themselves or represented by their descendants, and in that case half the estate is to go to the wife, and the other half is to be divided equally among "the next of kindred who are in equal degree, and those who legally represent them." But there are other possible cases for which the statute proceeds to provide. There might be no wife living at the death of the intestate, but there might be children living; or there might be no child living; and sect. 7 provides for both those cases. Mr. *Norton* construes sect. 7 as if it had said that the estate is "to be distributed equally to and amongst the children; and, in case there be no child, then to the next of kindred in equal degree of the intestate, including the descendants of deceased children, and their legal representatives as aforesaid." I think it would make no difference whether the word "representatives" is read as applying to "children," or not. But I think the true construction is, that the words "next of kindred" mean next of kindred exclusive of issue of the intestate. If there is no wife of the intestate living, the entirety of the estate is to go to his children, in the same way

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as two-thirds go to them under sect. 5 if there is a wife to share with them. The words "to and amongst the children" are not intended to define exactly how the estate is to go to them; they are merely words of reference to what has gone before, implying that the distribution of the whole is to be as already directed in the case of the two-thirds. The last clause of sect. 7 provides for the case of there being no child of the intestate. It does not say "in case there be no child or representative of any child," but I think it means "no child living either in person or in its descendants." The provision for "next of kindred" is addressed merely to the case of children, *i.e.*, children living either in themselves or in their descendants, being out of the way. I admit that this view of the meaning of the statute is contrary to that taken in *Williams* on Executors, following the older work *Toller* on Executors, and which has been adopted by some other text-writers. But the cases which are cited as authorities in support of the proposition applied to a different state of circumstances. They were all cases relating to collaterals, not to children of the intestate in the statutory meaning of the word "children."

The second rule stated in *Williams* on Executors (1) is as follows:—"Where the intestate's children are all dead, all of them having left children. If a father have three children, *John*, *Mary*, and *Henry*, and they all die before the father, *John*, leaving, for instance, two children, *Mary* three, and *Henry* four, and afterwards the father die intestate, in that case all his grandchildren shall have an equal share: for as his children are all dead, their children shall take as next of kin. Such also would be the case with respect to the great grandchildren of the intestate, if both his children and grandchildren had all died before him. In these instances, the parties are said to take *per capita*, or, in other words, equal shares in their own right."

That view is, however, at variance with the view taken in *Burton's* Compendium (2). There it is said: "It has been thought, however, that where the claimants are all in the same degree of lineal descent from the intestate (as grandchildren after the death of all his children), the distribution is not to be made on the principle of representation, but by the more simple rule of

(1) 8th Ed. vol. ii. p. 1503. (2) 7th Ed. p. 438, pl. 1403, n.

personal equality; or, as it is commonly expressed, *per capita*, and not *per stirpes*. See *Toller* on Executors (1). But it may be doubted whether this was the intention of the statute; and the authorities (as *Davers* v. *Dewes* (2); *Lloyd* v. *Tench* (3), &c.); which establish that mode of distribution in the case of collaterals, under sect. 6, are grounded upon a reason which does not apply to the issue of the intestate; (viz. that where all take as equally *next of kin*, the words of the statute afford no room for the introduction of representative claims). For there is no mention of the next of kin in any part of the statute which precedes the supposition of a failure of the intestate's issue."

A passage similar to that which I have read from *Williams* on Executors is to be found in the text of *Watkins* on Descents (4). But in the 4th edition there is this note by Mr. *Joshua Williams*: "The authorities here referred to do not support the position taken in the text. They are all cases of the children of deceased brothers of the intestate taking *per capita*, there being no mother, brother, or sister of the intestate living at his death. But in these cases the children of the brothers take as next of kindred, and not by representation, whereas the descendants of the children of an intestate take under the description of 'such persons as legally represent such children.' It would seem, therefore, that the grandchildren ought to be entitled *per stirpes*."

I have looked at the passage in Mr. *Hargrave's* Jurisconsult Exercitations (5) which was referred to by Vice-Chancellor *Wickens* in his judgment in *In re Ross's Trusts* (6), and I find that that learned writer takes a view at variance with that taken by *Williams* and *Toller*. Mr. *Hargrave* says: "A very distinguished civilian (7) of the present times (to whom his country already stands highly indebted for his elegant and masterly edition of *Justinian's* Institutions, and to whom it may owe far more if he should prosecute his design of a more enlarged commentary) seems to have been almost aware of this difficulty; and, as if he thought consistency required it, he openly contends on our *Statute of Distribution* for excluding the distribution *per stirpes*,

(1) Page 375.
(2) 3 P. Wms. 40.
(3) 2 Ves. Sen. 213.
(4) 4th Ed. p. 259.
(5) Vol. i. p. 271.
(6) Law Rep. 13 Eq. 294.
(7) Dr. *Harris*.

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even as amongst grandchildren, when they are the only claimants: though he candidly confesses, that by *Justinian's* law it was clearly otherwise, and that he did not meet with any judicial determination to prove the doctrine in respect to our own law. But it may be doubted, whether our Courts of Equity would be easily induced thus to extend this restrictive construction of the distribution *per stirpes* to descendants. It was once indeed attempted before Lord Chancellor *Hardwicke*. But, after hearing the point discussed, he discouraged the idea of a distribution *per capita*, and gave an opinion against it, though not a final one." It is clear, therefore, that the opinion of Lord *Hardwicke*, after hearing the point fully argued in *Lockyer* v. *Vade* (1), was in favour of a distribution *per stirpes* among grandchildren, and he arrived at his ultimate conclusion after having begun with taking the contrary view. There is, therefore, not merely a conflict of opinion among the text-writers, but there is what I must consider the decision of Lord *Hardwicke* that the division should be *per stirpes*. There is, moreover, the case of *In re Ross's Trusts* (2), before Vice-Chancellor *Wickens*. If I am right in my construction of the statute, that it gives nothing in terms to the grandchildren of the intestate, but that the provision for "children" covers all the descendants of children, the decision in *In re Ross's Trusts* is directly in point. If Mr. *Norton's* argument is correct, the fund in that case should have been divided into sevenths, instead of into moieties, and the distinction which he has attempted to draw does not seem to me to alter the effect of the decision. *In re Ross's Trusts* confirms my view of the construction of the statute, and it adopts that of Lord *Hardwicke*.

Under these circumstances, I hold that the one-sixth share of residue which is undisposed of in the present case must, so far as it consists of personal estate, be divided into moieties. One of the moieties will be equally divided among the three children of *Henry John Bassett*, the other will go to the representative of *G. N. Collin*. The lapsed share, so far as it consists of realty, will go to the heir-at-law of the testatrix.

Solicitors for all parties: *Walker & Battiscombe*.

(1) Barnardiston, Ch. 444. (2) Law Rep. 13 Eq. 286.

W. L. C.

Considered. Re GEORGE. [1949] 1 Ch. 154

In re VICKERS. VICKERS *v.* VICKERS.

NORTH, J.

1888

Jan. 18.

[1887 V. 61.]

Ademption—Bequest of Business—Double Portions.

A testator bequeathed his residue (including a business which he directed to be sold) for the benefit of his children equally. He had two sons and three daughters. Subsequently to the date of his will he assigned the business to his eldest son on trusts, which provided for the admission of the younger son as partner on equal terms with the elder on attaining full age, the repayment with interest to the father of a sum temporarily employed by him in the business, and the payment to the father of a weekly sum of £10 for life :—

Held, that the shares of the sons in the residue were adeemed to the extent of the value of the property assigned on trust for them at the time of the assignment, and must be brought into account in the distribution of residue.

THE late *George William Vickers*, bookseller, of *Angel Court, Strand*, made his will dated the 30th of April, 1867. After bequests to his wife and his executors the will proceeded : "and as to all my moneys in the English funds at my decease and all other my estate and effects (excluding the before and hereinafter-mentioned specific bequests) I give the corpus or principal equally between all my children, each son's share to be transferred to him at twenty-one years of age, and each daughter's to be held in trust, such trust to commence at her attaining the age of twenty-one years or marriage (whichever should first happen), as follows, viz., the dividends and interest for her separate use for her life and after her death for all her children equally who shall attain the age of twenty-one years or marry, if more than one, if one only then to such one child (when the principal of each of my daughter's shares is to be paid and transferred) to her child or children as the case may be, and in case any of my daughters shall have no such issue then the principal share of each such daughter shall go to her next of kin as if she had died unmarried. And in case any of my children should die being a son under the said age, or being a daughter under that age or marriage, the

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share of my children so dying (as well original as accruing under this provision) shall go to the survivors or survivor of my said children upon the same trusts as if such share had (in each case) been originally bequeathed. And as to the dividends and interest to arise from each of my said children's shares as aforesaid (as to each son's share until the said age and as to each daughter's until the like age or marriage previously) upon trust to permit my said wife to receive the same dividends and interest respectively during her widowhood, and afterwards (in case that event should happen) upon trust to lay out the dividends and interest of each child's share for his or her use, maintenance, education, and advancement in life.

"And I direct my said executors to sell and convert into money the lease, goodwill, book debts, stock in trade and effects of, in, and at my said premises in *Angel Court* either wholly or in part by public auction or private contract, and their receipts shall fully discharge the purchaser without seeing to the application of the purchase-money, and to invest the net proceeds in the English funds, and to permit my said wife to take the dividends thereof during her widowhood, and from the determination of that event my will is that the same shall fall into and form part of my money in the funds and residuary estate hereinbefore bequeathed, and be disposed of accordingly. And my will is that my said wife shall out of the bequests to her maintain, educate, clothe, and apprentice or otherwise advance to the best of her power all my children during their minorities (except as to daughters marrying before of full age, when my wife's liability as to them shall cease), having full confidence that she will do so. And I authorize my trustees and executors to apply any reasonable portion of each of my son's presumptive share during his minority for apprenticeship or advancement in life in case circumstances should so require.

"And I authorize my executors to compound and settle any debts or other outstanding trade accounts at their discretion, and to retain and reimburse themselves for their trouble and expenses in carrying out the trusts hereof."

The testator's wife died in April, 1876. He died on the 6th of July, 1886, and had five children, three daughters and two sons;

the youngest son, *George Frederick Vickers*, was born on the 2nd of July, 1868.

On the 10th of June, 1886, a deed was executed between the testator of the one part and his eldest son, *William Edward Vickers*, of the other part. The deed recited that the testator had determine to retire from his business in favour of his two sons, one of whom was under age, and that he had transferred into the name of his eldest son the balance standing to his trade account at the *London and Westminster Bank* (including a temporary advance from himself of £500). The operative part of the deed was in twelve clauses. It was witnessed that

"1. In consideration of the facts and circumstances hereinbefore recited, and also in consideration of the covenants on the part of the said *William Edward Vickers* hereinafter contained, the said *George William Vickers* as beneficial owner hereby assigns unto the said *William Edward Vickers* all the beneficial interest and goodwill of the said *George William Vickers* in the business so carried on by him as aforesaid, and also all the book and other debts now due and owing to him on account of the said business and all securities for the same, and also all contracts and engagements, benefits, and advantages in or to which the said *George William Vickers* is interested or entitled on account or in respect of the said business, and also the stock-in-trade, goods, fixtures, articles and things which now belong to the said *George William Vickers* on account of the said business or are used for the purposes thereof, To hold unto the said *William Edward Vickers* absolutely, but nevertheless upon the trusts and subject to the provisions hereinafter contained.

"2. The said *William Edward Vickers* shall stand possessed of the said leasehold premises when assigned to him, and of the said banking balance, and the premises hereby assigned upon trust to carry on the said business at No. 1, *Angel Court*, aforesaid, under the style or firm of "*George Vickers*," and either alone or in partnership with the said *George Frederick Vickers* after he shall have attained the age of twenty-one years, so long as any of the other trusts of these presents shall be subsisting.

"3. If the said *George William Vickers* shall die during the minority of the said *George Frederick Vickers* the weekly sums

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hereinafter by paragraph 5 made payable to the said *William Edward Vickers* and *George Frederick Vickers* respectively shall thenceforth during the minority of the said *George Frederick Vickers* be increased to £6 and £3 per week respectively.

"4. The net moneys received by the said *William Edward Vickers* by virtue of the foregoing assignment (including the earnings of the business) shall be paid to the banking account of the business.

"5. During the minority of the said *George Frederick Vickers*, provided the said *George William Vickers* shall so long live, the said *William Edward Vickers* out of the moneys for the time being standing to the credit of the banking account of the business shall pay to the said *George William Vickers* the weekly sum of £10, and to or for the benefit of the said *George Frederick Vickers* the weekly sum of £1 for one year from the date hereof, and the weekly sum of £2 after the expiration of such one year, and shall be entitled to retain for his own use the weekly sum of £2 during one year from the date hereof, and the weekly sum of £3 during the remainder of the minority of the said *George Frederick Vickers*.

"6. If on attaining the age of twenty-one years the said *George Frederick Vickers* shall be willing to enter into partnership with the said *William Edward Vickers* (as the said *George William Vickers* wishes him to do), he the said *William Edward Vickers* shall be bound to admit the said *George Frederick Vickers* forthwith into partnership, and to an equal share of the property and profits of the business if both partners devote their whole time and attention thereto."

Clause 7 provided that, subject as aforesaid, the term of the partnership should be left to agreement. Clause 8 provided for the accumulation of the profits as a suspense fund during the minority of the youngest son, for the benefit of the two sons, if the younger should die under age for the elder alone, with a provision that the suspense fund might be resorted to, if necessary, for business purposes. Clause 10 gave the testator a power of appointing a new trustee in certain cases. The other two clauses were as follows:—"11. If the said *George Frederick Vickers* shall die under the age of twenty-one years, or when of full age shall

decline to enter into partnership with the said *William Edward Vickers*, it shall be lawful for the said *William Edward Vickers* to carry on the said business on his own account, and if the said *George Frederick Vickers* when of full age shall be willing to enter into partnership, but the said *William Edward Vickers* shall desire to retire, or shall decline to enter into partnership with the said *George Frederick Vickers*, it shall be lawful for the said *George Frederick Vickers* to carry on the said business on his own account, but whichever of the two shall become entitled to carry on the said business alone (except in the event of the said *George Frederick Vickers* dying under the age of twenty-one years) shall pay or secure to the other the value of one moiety of the trust premises as follows: that is to say, one fifth to be paid immediately, and the balance by eight equal half-yearly instalments, bearing interest at £5 per cent. per annum, such value to be ascertained by arbitration in case of dispute.

"12. The said *William Edward Vickers* hereby covenants with the said *George William Vickers* that the said *William Edward Vickers* and *George Frederick Vickers*, or one of them, will on the said 31st day of August, 1886, pay to the said *George William Vickers* the said sum of £500 so advanced by him to the said business as aforesaid, with interest thereon in the meantime after the rate of £5 per cent. per annum, computed from the date of these presents, and also so long after that day as any principal money remains due in respect of the said sum of £500 to pay to him interest thereon after the same rate by equal quarterly payments, and also that the said *William Edward Vickers* and *George Frederick Vickers*, or one of them, will from time to time and at all times hereafter keep indemnified the said *George William Vickers* and his estate and effects from and against all debts and liabilities in respect of the said business, and from all actions, claims and expenses in relation thereto.

The only executor named in the will who survived the testator renounced, and letters of administration were granted with the will annexed to *Emily Georgiana Vickers* and *Louisa Elizabeth Vickers*, the two daughters of the testator, then of age. The third daughter, *Sophia Vickers*, had since attained full age.

This was an originating summons, to which the two adminis-

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tratrixes were Plaintiffs, and the two sons and the other daughter of the testator Defendants. The summons asked "to have it determined whether the shares of the Defendants *William Edward Vickers* and *George Frederick Vickers*, or either of them, in the residuary estate of the testator, are adeemed to any and what extent."

Farwell, for the Plaintiffs:—

In *Holmes* v. *Holmes* (1) it was held that in that particular case a father by taking his son into partnership and giving him capital did not adeem a legacy. The two cases, *Bengough* v. *Walker* (2), and *In re Lawes* (3), establish that there is not such dissimilarity in the subject-matter between a gift of a share in a business and a gift of money or residue as to prevent the share being taken in satisfaction or as an ademption. Indeed, *Holmes* v. *Holmes* is disapproved of in *In re Lawes* and *Pym* v. *Lockyer* (4); at the most it can be taken as depending on special circumstances not clearly appearing in the report. There are some remarks in *Bengough* v. *Walker* which might tend to shew that the fact that the defendant had not appreciated the value of his gift, or that the value did not amount to the legacy, shewed an intention that the gift should not adeem the legacy. Those remarks were made at a time it was supposed there could only be ademption *in toto*: *Grave* v. *Earl of Salisbury* (5). It is now established that there can be ademption *pro tanto*: *Pym* v. *Lockyer*.

The reason of the rule against double portions is to establish equality between children, and it applies to all gifts of all kinds of personal estate: *Pym* v. *Lockyer*; *Thynne* v. *Earl of Glengall* (6); *Montefiore* v. *Guedalla* (7); *Leighton* v. *Leighton* (8). In this particular case the business was expressly referred to in the will, directed to be sold, and the proceeds were to form part of the residue; therefore there is an additional presumption that the immediate benefit given to the sons was to be brought into hotchpot.

(1) 1 Bro. C. C. 555.
(2) 15 Ves. 507.
(3) 20 Ch. D. 81.
(4) 5 My. & Cr. 29.
(5) 1 Bro. C. C. 425.
(6) 2 H. L. C. 131.
(7) 1 D. F. & J. 93.
(8) Law Rep. 18 Eq. 458.

Everitt, Q.C., and *Monckton*, for the sons:—

In the first place there is such a discrepancy between the subject of the gift, if gift it be, of the business and the gift of a share of the residue in money, that the presumption will be rebutted. *Holmes* v. *Holmes* (1) is an authority that has never been overruled. Both in *Bengough* v. *Walker* (2) and *In re Lawes* (3) the circumstances were such that the gift of capital in the business was in effect a gift of a sum of money. In the former case it was either to be of the value of £10,000 or was to be part of a £10,000 left to the beneficiary. In the latter case, it appears from the judgment of Mr. Justice *Fry* (4) that there was an actual gift of £19,000, which the son agreed to take as capital in a business into which he was taken; a material element in both those cases influencing the Court in coming to the conclusion that there was no intention to make two gifts was that the advance was greater in value than the bond or legacy. There are several circumstances from the nature of the transaction shewing that there could have been no intention to adeem, for there is not an out-and-out gift to one or both sons. The interest either was to take was not determined, and the gift was hampered with conditions.

In the second place, we say that there was no gift at all, the transaction was in reality an out-and-out sale, the assignor of the business, the father, was to receive a substantial annuity; there was a covenant to pay £500 and interest, and there was a provision to indemnify the father against creditors.

Farwell, in reply:—

The assignment of the business was clearly intended for, and was, a benefit to both sons, and a provision for them. The withdrawal of £500, which was only temporarily in the business, and the payment of an annuity to the father, were matters affecting the value of what was given. The indemnity against creditors was only what a purchaser would have given. The value is to be ascertained at the date of the gift: *Watson* v. *Watson* (5).

(1) 1 Bro. C. C. 555.
(2) 15 Ves. 507.
(3) 20 Ch. D. 81.
(4) Ibid. 84, 85.
(5) 33 Beav. 574.

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The question is whether a gift of a share of residue contained in a will is adeemed by the gift of a business, part of the residue, by a deed. In this respect the circumstances are somewhat peculiar, because the property dealt with by the deed is specifically dealt with by the will as part of the residue. It is hardly a case in which the testator can be said to have ascertained or estimated the value of the gift; that is not necessary. There is clearly in substance a handing over of the whole business whatever its value was to one or both of the sons. I will treat it as if it was to one son only.

There does not seem such a want of harmony in the subject-matter of the gift in the will and the subject of the gift in the deed, or such incongruity between the two things, as to create a difficulty in saying that the one can be taken in satisfaction for the other. I see nothing in the nature of the property given to prevent the rule against double portions applying, and the gift of the business to both or either of the sons being a satisfaction *pro tanto* of his or their share in the residue. Three cases cited seem to me in point, and two of them, *Bengough* v. *Walker* (1) and *In re Lawes* (2), shew that there is nothing in the nature of the property to rebut the presumption against double portions. The third and older case, *Holmes* v. *Holmes* (3), seems to have been, and was, recognised in *In re Lawes* as a special case depending on special circumstances; but in both the other cases it was recognised that a share in a business is a thing capable of being taken in satisfaction of a gift of personal estate. In *Bengough* v. *Walker*, which was a case of satisfaction, not ademption, the thing given by will was a share in powder works. There had been a previous covenant by the testator, the father, to pay a sum of £2000; then the bequest was a bequest to the son of all the testator's "capital, share, interest, and concern in certain powder works;" the father also bequeathed to the son "so much money as, being added to the capital of the said powder work concern at the last settlement before the testator's decease, should make up in the whole the full and complete sum of £10,000; he *Abraham Elton*, paying

(1) 15 Ves. 507. (2) 20 Ch. D. 81.

(3) 1 Bro. C. C. 555.

thereout to Mrs. *Prout* for life £20 a year." What was given there was the capital in a business; I do not see that it was in any way appreciated or had any value put upon it by the testator. It is true that he said that at some time and for some purposes a value must be put on it, for it was intended to give an amount up to £10,000, but he did not put any value on it at the time of making his will; and it seems to me from the report that the effect would have been precisely the same and the operation on the covenant to pay £2000 must have been the same if there had been no direction to make up the gift to £10,000, and that part of the gift had been left out.

Then again in the case of *In re Lawes* (1) there was a bond to pay the obligor's reputed son £10,000 on a certain day four years later. Shortly before the day for payment he took the son into partnership, and it was provided by the articles of partnership that the capital should consist of £37,500 to be brought in by him, of which £19,000 should be considered as belonging to the son. The £10,000 was never paid. It was held in a suit to administer the father's estate that the rule against double portions applied. The late Master of the Rolls after pointing out that the case of *Holmes* v. *Holmes* (2) was a case not so sufficiently reported as to be useful as a guide in the case before him (which remark, in my opinion, applies also to the present case) referred to a passage from the judgment of Sir *William Grant* in *Bengough* v. *Walker* (3), relating to the older authorities: "But it is to be observed, that in none of those cases did the party making the advance, or the bequest, ever make either with reference to a definite amount, to which he intended it should reach. They are all cases, in which the testator, without reference to the pecuniary value of the thing he was giving, has given it; and the question was, whether, as upon entering into a computation of the value of the thing given, it turned out equal to the portion, or the legacy, it should be taken as a satisfaction; the testator not having indicated any idea of his own, whether it was, or was not, correspondent in value to the debt, which he owed, or the legacy he gave. Those cases, therefore, would not precisely apply."

(1) 20 Ch. D. 81. (2) 1 Bro. C. C. 555.
(3) 15 Ves. 512.

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Upon that the Master of the Rolls said (1): "The true meaning of that is, that where a testator gives to a child a beneficial lease or share of works, or any other thing, and says nothing about the value, he is not to be taken to be giving it in satisfaction of a pecuniary bequest; but where he does refer to the value the presumption of satisfaction may arise." Now what I understand him to be doing is to be commenting on the meaning of language used by a former Judge in a case decided at a time when it was considered that a gift of something to go in ademption of a legacy must be something that would satisfy the legacy altogether and not *pro tanto*, and he is not expressing his own view of the law at the time he was speaking. The view of the Master of the Rolls and of the whole Court in that case was that a gift of a share in a business, in that case more valuable than a legacy, was of itself sufficient to adeem the legacy, and that the rule that there is a *primâ facie* presumption against double portions applied, and that in that case there was nothing to rebut it.

Another ground taken by Mr. *Everitt* was, that the transaction carried out by the deed was a sale out-and-out for valuable consideration, and not an advancement. In my opinion it was not a sale out-and-out, but was a transaction by means of which the testator intended to provide for his two sons. The mere fact that some benefits were given to the testator would not be enough to prevent the transaction being treated as an advancement that would work an ademption. It is clear that the obligation of the legatee in *Bengough* v. *Walker* (2) to pay an annuity of £20 a year, was not considered enough. Therefore in the present case it must be considered whether what was done was intended as a gift by way of portion. In considering that the obligations entered into by the eldest son form an element to be taken into account. It is suggested that as matter of principle, instead of its being a boon, what was done was a bargain, and cannot operate as a portion. There is no doubt that an advance made by a father to a son on marriage will operate as an ademption, and yet in that case consideration is given; there is the consideration of marriage in every case; and property may or may not be brought in by the wife. The fact that there was

(1) 20 Ch. D. 88. (2) 15 Ves. 507.

some contract between the father and the son is not enough to prevent the operation of the rule against double portions. Looking at the nature of the agreement there is nothing to prevent what the son received in trust for the two being taken as a portion or portions. The fact that the father was to be paid £520 a year out of the business is not material for the present purpose; it is a matter to be taken into consideration in considering what the value of the gift was. It seems to me the value of what the eldest or both sons take under the deed is to be taken into consideration in estimating the daughters' shares. It is not possible for me now to say precisely what that value is. It is sufficient to declare that the value of the gift at the time it was made must be taken into consideration. There will be an inquiry as to the value at the date of the deed.

Solicitors for all Parties: *Monckton, Long & Gardiner.*

D. P.

In re BETTESWORTH AND RICHER.

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 257 [*Revised Ed. Statutes, vol. xvii. pp.* 567, 602]—*Private Road—Vendor and Purchaser.*

Leasehold houses in an urban district, abutting partly on a private road, were sold on an open contract; at the date of the sale works had been done by the local board of the district on the road under sect. 150 of the *Public Health Act*, 1875; the final demand for payment of the sum apportioned in respect of the premises was served after the purchase ought to have been completed:—

Held, that the apportioned expenses became a charge on the premises at the date of completion, and as between the vendor and purchaser were payable by the vendor.

THIS was a summons by a vendor of certain leasehold premises that, with regard to a sum of £41 14*s.* 6*d.* payable to the *Willesden Local Board*, it might be declared that the said sum was payable by the purchaser and not the vendor.

The property in question consisted of Nos. 1, 1A, and 2, *Gresham Buildings, Willesden Green*, held for a term of eighty-seven years

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at a ground rent of £27, subject to certain mortgages to the amount of £1500 in all. *Richer* contracted to purchase the property from *Bettesworth* for £100. The contract was an open contract, constituted by a letter of offer from *Richer*, dated the 17th of September, 1886, and a letter of acceptance by *Bettesworth* dated the 20th of September, 1886. The title was accepted and an assignment prepared and approved, and the purchase would have been carried out in December, 1886, but the purchaser required the vendor to discharge the liability to the local board, in respect of the £41 14*s.* 6*d.*, and the vendor refused to do so.

The premises fronted *Willesden Lane*, a public road. No. 1 *Gresham Buildings* abutted also on *Villiers Road*, a private road.

On the 20th of November, 1885, the *Willesden Local Board*, the urban sanitary authority of the district within which the property was situated, gave notice to the owners of the land abutting on *Villiers Road*, under sect. 150 of the *Public Health Act*, 1875, to pave and do other works specified in the notice on the road. The owners having made default in not complying with the notice, the board procured the work to be done by contractors. The work was commenced on the 5th of April, 1886. It was completed, as the Judge held on the evidence, not later than the 26th of June, 1886. The surveyor apportioned the sum of £41 14*s.* 6*d.*, as the part of the expenses incurred in doing the work payable in respect of No. 1, *Gresham Buildings*. Notice of the apportionment, dated the 20th of September, 1886, was served on the 7th of October, 1886. The amount apportioned was not disputed within three months, and on the 18th of January, 1887, a demand for payment was served on the premises, dated the 7th of January, 1887.

Swinfen Eady, for the vendor:—

No liability arises to pay the apportioned expenses till the final demand shall have been served, till that is done they cannot be recovered: *Grece* v. *Hunt* (1); that is the time when the premises first become charged: *Reg.* v. *Swindon New Town Local Board* (2).

The contract ought to have been carried out before that time,

(1) 2 Q. B. D. 389. (2) 4 Q. B. D. 305.

the payment is therefore an outgoing to be discharged after the time of completion, which ought to be borne by the purchaser.

Grosvenor Woods, for the purchaser:—

In the first place, independently of the construction to be put upon the *Public Health Act*, inasmuch as the work was apparently completed, the purchaser had a right to suppose it was paid for, he bought the property with the improvement upon it, and it was the duty of the vendor to disclose a hidden incumbrance, even if it had not ripened.

But even upon the words of the statute the charge accrued when the work was done at the latest. Sect. 257 makes the expenses payable by the owner at the time the work is done: *Tottenham Local Board* v. *Rowell* (1); *Corporation of Birmingham* v. *Baker* (2).

Swinfen Eady, in reply.

NORTH, J. (after stating the facts, and finding on the evidence that the work was completed on the 26th of June, 1886, continued):—

The vendor says that the sum of £41 14*s.* 6*d.* payable to the board is an outgoing accruing after the date when the purchase would have been completed but for the default of the purchaser in raising this objection. The purchaser on the other hand says that it was then a charge on the property subject to which the property was not sold, and it ought to be discharged by the vendor. The question is raised when the money payable first became a charge on the property. In my opinion it became a charge at all events as early as the 26th of June, 1886. Two sections, and two sections only, of the *Public Health Act*, 1875, are material. Sect. 150 provides "Where any street within any urban district (not being a highway repairable by the inhabitants at large), or the carriage-way footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respec-

(1) 15 Ch. D. 378. (2) 17 Ch. D. 782.

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tive owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such notice." The section then provides for the previous making of plans and sections of the works required, and a little further on it says: "If such notice is not complied with, the urban authority may, if they think fit, execute the work mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act," or they may declare the expenses private improvement expenses. In that part of the section the owners in default clearly mean the owners who have not done the work they had notice to do, and that was the construction put upon those words in the case of *Reg.* v. *Swindon New Town Local Board* (1). Chief Justice *Cockburn*, says, "We have the words 'owner in default,' that is to say, the person who as owner is required to do work, and is in default by reason of not having done it." Then sect. 257 provides, "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding £5 per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises,"—not at the time of making the demand, but—"when the works are completed for which such expenses have been incurred; and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred."

Then a little further on it provides that "Where such expenses have been settled and apportioned by the surveyor of the local

(1) 4 Q. B. D. 305, 307.

authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same." Therefore it comes to this, that the expenses are charged from the time of the completion of the work. That seems to me the construction of the section. And in that view I am fortified by the opinion of the Judges who decided the case of *Tottenham Local Board of Health* v. *Rowell* (1), when they had that case before them on the construction of a section in an earlier Act, which does not appear in this respect distinguishable from the *Public Health Act*, 1875. It is quite true that the owner cannot be compelled to pay till the total costs have been made out and apportioned between the owners, and notice has been served, and he has had three months to dispute the apportionment, and at the end of the three months has had written demand served upon him. The Act says payment may be recovered from the person who is owner at the time when the works were completed, and he is the person charged under the Act.

There are certain observations by Chief Justice *Cockburn* in the case of *Reg.* v. *Swindon New Town Local Board* (2) which are said to be at variance with this view. But it is necessary to bear in mind the dates of the transactions in that case, and then it will be seen that there is no conflict between that decision and my view. What took place there was this. *Hilton* the appellant, had been served (as the owner of premises abutting on a street not being a highway repairable by the inhabitants at large) with notice to do works under sect. 150; he made default, and the urban authority did the work. The work was completed on the 16th of May, 1876. On the 21st of June he received notice that expenses had been apportioned, stating the amount payable by him, and on the 17th of December demand was made upon him. It appeared that at the time the work was completed he was not the owner, and was not the person who received the rent, one *Deacon* having purchased them, and since May, 1876, been rated for them. It is pressed upon me that Chief Justice *Cockburn* says (3):

(1) 15 Ch. D. 378. (2) 4 Q. B. D. 305. (3) 4 Q. B. D. 307.

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"the 'owner in default' . . . must be a person who continues to be owner at the time the work is completed, and when the money laid out upon it is demanded from him." But that is a mere description of *Deacon*, who in that case was the owner at both periods: and what the Court had to deal with was whether the appellant or *Deacon* was liable, and the Court had no point before them to decide, as between the owners at the two periods, if one person had been in the position of owner when the work was completed, and another when the rate was demanded. Those remarks therefore, though they justify counsel in calling my attention to them, do not impress me in the least. Now when you look at the section it seems to me clear, because it says, not from the owner at the date of the service of the demand but from the owner when the works are completed. Moreover, Sir *George Jessel* in *West* v. *Downman* (1) expresses an opinion that the corresponding section in the earlier *Public Health Act* makes the person who at the time of the completion of the works is the owner of the property in respect of which the expenses have been incurred liable for the expenses, and they are made a charge on the property: and says nothing about his being owner when the expenses are demanded. Now who was the owner at that date—the 26th of June? beyond all question the vendor. Under the circumstances I do not feel constrained by the observations of the Lord Chief Justice from coming to what I consider the true construction of the Act. It seems to me that the expenses were a charge which came into existence, at all events, as early as the 26th of June, 1886. They constituted an incumbrance subject to which the property was not sold, and the vendor was bound to get rid of it. The vendor's summons will therefore be dismissed with costs.

Solicitors for Plaintiff: *Chester, Mayhew, Broome, & Griffithes,* agents for *W. Perkins, Hepherd, & Winstanley, Southampton.*

Solicitor for Defendant: *F. G. Mellows,* agent for *W. Mellows, Peterborough.*

(1) 14 Ch. D. 111; see p. 120.

D. P.

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STIRLING, J.

March 16, 21, 22, 23, 24.

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Nov. 14, 15, 17, 19, 21.

[1885 P. 320.]

Company—Misrepresentation in Prospectus—"Legal Fraud"—Action of Deceit—Tramway Company—Power to use Steam—Measure of Damages.

Where a misstatement of fact by the Defendant materially tended to induce the Plaintiff to do an act by which he has incurred damage, the Defendant may be made liable in an action of deceit, although the misstatement was not the only inducement to the act.

The Act incorporating a tramway company provided that the carriages might be moved by animal power, and, with the consent of the Board of Trade, by steam or other mechanical power. The directors, who expected that they would without difficulty obtain the consent of the Board of Trade, issued a prospectus in which they stated that by their special Act the company had a right to use steam power instead of horses. The Plaintiff took shares on the faith of this prospectus: and stated in his evidence that he was induced to take them by the statement that the company had the right to use steam power, and also by his knowledge of, and interest in, the locality, and his confidence in the character of the directors. The Board of Trade refused their sanction to the use of steam-power, and the company was wound up. The Plaintiff brought an action against the directors claiming damages for their misstatement in the prospectus:—

Held (reversing the decision of *Stirling*, J.), that the directors were liable for the misstatement, as it was made without reasonable ground for their believing it.

Held, also, that the amount of damages to be recovered by the Plaintiff was the difference between the price paid by him for the shares and the real value of the shares at the time of allotment; and that such value must be ascertained not by the market value of the shares at the time, but by the light of subsequent events, including the result of the winding-up of the company.

One of the Defendants was not present at the meeting which issued the prospectus, but a few days afterwards he received some copies of it and circulated them:—

Held, that he had adopted the prospectus, and was liable to the Plaintiff, although the copy seen by the Plaintiff had not been supplied to him by the Defendant.

The expression "legal fraud" considered and explained.

THE action in this case was brought by Sir *H. Peek* against Mr. *W. Derry*, the chairman, and Messrs. *J. C. Wakefield*, *M. M. Moore*, *J. Pethick*, and *S. J. Wilde*, four of the directors of the *Plymouth, Devonport and District Tramways Company*, claiming

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damages for the fraudulent misrepresentations of the Defendants whereby the Plaintiff was induced to take shares in the company.

The company was incorporated in the year 1882 for making and maintaining tramways in *Plymouth, Devonport,* and *Stonehouse.* The nominal capital was £125,000 in shares of £10 each.

The *Plymouth, Devonport and District Tramways Act,* 1882 (45 & 46 Vict. c. clix.), by which the company was incorporated, contained the following clause (sect. 35) :—

"The carriages used on the tramways may, subject to the provisions of this Act, be moved by animal power, and, with the consent of the Board of Trade, during a period of seven years after the opening of the same for public traffic, and with the like consent during such further periods not exceeding seven years as the said board may from time to time specify in any order to be signed by a secretary or an assistant secretary of the said board, by steam-power or any mechanical power: Provided always, that the exercise of the powers hereby conferred with respect to the use of steam or any mechanical power shall be subject to the regulations set forth in the Schedule A. to this Act annexed, and to any regulations which may be added thereto or substituted therefor by any order which the Board of Trade may and which they are hereby empowered to make from time to time, as and when they may think fit, for securing to the public all reasonable protection against danger in the exercise of the powers by this Act conferred with respect to the use of steam or any mechanical power on the tramways: Provided also, that the company shall not use steam-power or any mechanical power on the said tramways unless and until they shall have obtained the previous consent in writing of the corporations [*Plymouth* and *Devonport*] therefor, and then for such terms only and subject to such conditions and regulations as the corporations may from time to time prescribe."

By sect. 64 it was provided that the company should not open any of the tramways for public traffic without the consent of the corporations.

In October, 1882, the directors issued a prospectus which contained the following paragraph: "As by sect. 35 of the *Plymouth and Devonport District Tramways Act,* 1882, power is given to use either animal, steam or mechanical means of locomotion, the

directors will adopt that motive power which experience may demonstrate to be at once the most economical and effective." It did not appear that the Plaintiff ever received a copy of this prospectus.

On the 1st of February, 1883, the directors of the company issued a second prospectus, which contained a heading in large type as follows: "Incorporated by special Act of Parliament 45 & 46 Vict. authorizing the use of steam or other mechanical motive power." The prospectus contained the following paragraphs:—

"One great feature of this undertaking, to which considerable importance should be attached, is, that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line, as compared with other tramways worked by horses."

"Looking to the exceptional advantages offered by this undertaking, from the dense population of the towns it traverses, the unusually favourable conditions as to motive power open to the company, and the annual dividends earned by other companies which do not enjoy such special privileges, the directors have reason to believe that the enterprise will prove highly remunerative, and the shares now for subscription offer a very favourable opportunity for a sound and progressive investment."

The Defendants at the same time issued a circular letter, which was sent with the prospectus, in which it was stated that "the company by its Act enjoys the special privilege of the right to use steam-power instead of horse-power, from which it is expected considerable savings will result in the working expenses."

The Plaintiff received copies of this prospectus and circular, and believing, as he alleged, that the company had an absolute right to use steam and other mechanical power, and relying upon the representations and statements in the prospectus and circular, applied on the 7th of February for 400 shares, for which he paid £4000.

About £40,000 only of the capital was subscribed; but the directors completed part of their tramway in *Plymouth*. The

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corporation of *Devonport* refused their consent to the company opening the completed part until the remaining portion was ready, and on the 14th of November, 1884, obtained an injunction restraining the company from so doing. When the Board of Trade were applied to, they refused to sanction the use of steam-power except over a small portion of the tramways.

The result was that the company was unable to carry out its proposed undertaking, and a petition for winding-up was presented, which was followed by a winding-up order on the 2nd of May, 1885.

The writ in this action was issued on the 4th of February, 1885, a few days after the petition for winding-up, by Sir *H. Peek* against the chairman and directors named above, claiming in the first instance a rescission of the contract for shares and repayment of the money paid by him, and damages; but the writ was afterwards amended, and claimed only damages for the misrepresentations in the prospectus and circular.

The defence pleaded by the Defendants was that they did not represent, or intend to represent, in the prospectus and circular that the company had an absolute right to use steam or other mechanical power; that the Plaintiff knew that the use of steam power was never, or seldom, given unconditionally to a tramway company, and that he was acquainted, or might have made himself acquainted, with the provisions of the company's special Act, which was referred to in the prospectus, and might be seen at the company's office; and they denied that the Plaintiff was induced to take the shares by the representations complained of. They also pleaded that if the statements complained of were untrue, they were made by the Defendants in good faith, and that they had reasonable grounds for believing them to be true: that in fact the consent of the corporation of *Plymouth* to the use of steam was given in June, 1883, and the consent of the Board of Trade to its being used in a portion of the tramways had also been given.

The Defendant *Derry* also pleaded that he was not personally responsible for the issue of the prospectus and circular. It appeared, however, from the evidence, that although he was not present at the board meeting on the 29th of January, 1883, at

which they were sanctioned, he attended at a previous meeting of the board on the 24th of January, 1883, at which it was resolved, at the request of the contractors, that a new prospectus on the basis of the previous one should be issued and advertised, subject to the undertaking that should any present applicant desire to withdraw his application for shares he should have his deposit returned.

It also appeared from the evidence that the Defendant *Derry*, as well as the Defendants *Pethick*, *Moore* and *Wakefield*, had received £500 from one of the promoters of the undertaking to qualify them as directors of the company; but they had all subsequently returned the money to him.

On the 21st of October, 1884, the directors issued their first annual report, in which they stated that General *Hutchinson*, the Board of Trade inspector, had made an inspection of a portion of the lines on the 11th of July, and had refused to certify for the use of steam or other mechanical motive power over portions of the line where the streets were narrow and the gradients steep, but that negotiations were still going on with the Board of Trade in order to remove the objection to the use of steam; and further, that the corporation of *Devonport* had refused to permit the lines in *Plymouth* to be opened until the lines in *Devonport* should be completed.

On the 6th of November, 1884, a general meeting of the company was held at *Cannon Street Hotel*, when the report was considered. At that meeting the Plaintiff attended and made a speech, in which he was reported to have said that he had read the report with surprise; that he had obtained some independent information from *Plymouth*, and should have something to say on that, but that as he understood there was to be an interview with the Board of Trade, it would be well, perhaps, that not much more should be said; that he wished to give the directors, in whom they had every confidence, full opportunity of carrying out their policy without interference from the shareholders.

At the trial of the action the Plaintiff gave evidence, in the course of which he stated that he had always understood that steam or mechanical power was equal to a dividend of 2 per cent. In answer to the question what were the motives that induced

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him to invest in the company's shares, he said: "I am of *Devonshire* extraction and have a house there. I do a large trade in the West of *England*, and I have a representative who lives at *Plymouth*. I know *Plymouth*, *Devonport* and *Stonehouse* very well: there are a great many workmen who pass to and fro, and if a tramway would pay a reasonable dividend anywhere I think it would pay there; and having this steam power it made, as I said before, 2 per cent. difference. In the case of our making 4 per cent. it would be 6 per cent. And more than that, I applied for shares after having particularly inquired as to the character of the directors, and especially of Mr. *Derry*. I understood that Mr. *Derry* was a most respectable man, and that he had filled some of the highest offices in the corporation. These were the motives which induced me to send in an application for £4000 worth of shares." He also said that he sent in his application in consequence of the prospectus and the inquiries which he had made: that he did not know at that time the contents of the Acts of Parliament; that he took the statements in the prospectus in their common literal sense—that the company had the right absolutely to use mechanical motive power: and that he did not know at that time whether any consent would be required before they used steam power. He was asked whether, if it had not been for the characteristic that the company might use steam power he would have applied for the shares; but the question was objected to and not pressed.

The Plaintiff was cross-examined as to his motives for taking the shares, but adhered to his statements; and when asked whether, if the 35th section of the Act had been set out in the prospectus, he would have been influenced by it, he answered, "I do not suppose I should even have read it." In re-examination he was asked whether, if instead of the statement in the prospectus that the company had a right to use steam power there had in its place been a statement that under their Act of Parliament they could use steam power for seven years if the consent of the Board of Trade and the corporations of *Plymouth* and *Devonport* was obtained, that would have affected his opinion with regard to the steam, he answered "Yes, if my attention had been called to anything of that sort. I intended to hold these shares, not to sell them, and if

there had been any different circumstances at the end of seven years, I should have looked at it with a critical eye. I do not say that I should not have taken those shares, but I should have looked at it critically under the circumstances." The Plaintiff was also asked when he first heard that the consent of the Board of Trade was necessary; but he replied that he could not say. Other passages in the examination are referred to in the judgment of Mr. Justice *Stirling*.

The action came on for hearing before Mr. Justice *Stirling* on the 16th of March, 1887.

Bompas, Q.C., and *E. W. Byrne*, for the Plaintiff:—

The Plaintiff has shewn (1) that there was actual misrepresentation of fact, (2) that he relied and acted on it, (3) that the misrepresentation was false to the knowledge of the Defendants or carelessly made by them, and (4) that he has suffered damage; and he is consequently entitled to the relief he asks for.

The Plaintiff took these shares upon the faith of the statement in the prospectus that the company had the right to use steam-power. This statement was false, for the company had not then, and never did obtain this right; and this was one of the causes of their subsequent failure. Their special Act provided that the carriages used on the tramway were to be moved by animal power; and though it gave the directors, in addition to this, the contingent possibility of acquiring the right to use steam-power, if they could get the consent of the Board of Trade and the consents of the corporation of *Plymouth* and the corporation of *Devonport*, the directors never even applied for any one of these three consents until after they issued the prospectus. The directors very probably thought they were sure to get these consents; but that is not enough. They knew, or must be taken to have known, that they had not actually got them. As was laid down by Lord *Blackburn* in *Smith* v. *Chadwick* (1): "The motive of the person saying that which he knows not to be true to another with the intention to lead him to act on the faith of the statement is immaterial;" if the Defendants "trick" the Plaintiff into taking shares "they are civilly responsible as for a

(1) 9 App. Cas. 187, 201.

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deceit." If a director authorizes a prospectus to be issued in his name he is responsible for the statements contained in the prospectus, whether he takes the trouble to read it or not: *Weir* v. *Bell* (1). The materiality of the statement must be considered with reference to the time at which it was made and acted upon, and the statement in this case was a positive material statement operating as a main inducement upon the Plaintiff's mind at the time he applied for the shares, which statement was false in itself when standing alone, and also, under the head of fraudulent omission, false by reason of the concealment of a material fact which ought to have been made known: *Peek* v. *Gurney* (2); *West London Commercial Bank* v. *Kitson* (3); *Edgington* v. *Fitzmaurice* (4).

W. Pearson, Q.C., and *Seward Brice*, Q.C., for the Defendant *Derry*:—

This is a pure common law action of deceit, and (1) there must be a false representation of an existing fact; (2) that false representation must be made knowing it to be false, or made so recklessly that the Court will attribute to the person so making it knowledge that it actually was false; (3) it must be shewn that the Plaintiff was misled by the statement, and acted upon the faith of its being true; and (4) that he suffered damage thereby, for it is the damage which gives the right to sue upon the false statement. Moreover, the Plaintiff must specifically aver and prove the statement which he alleges to be untrue: *Arkwright* v. *Newbold* (5). In that case *James*, L.J., says (6): "We cannot accede to the suggestion . . . that the persons issuing a prospectus are liable to an action of deceit because they do not mention a fact coming to their knowledge before the allotment of shares which falsifies a statement in the prospectus."

In an action for damages for misrepresentation with reference to the subject-matter of a contract the plaintiff must prove fraud, and there is no such thing as "legal" fraud as distinguished

(1) 3 Ex. D. 238.
(2) Law Rep. 6 H. L. 377, 391.
(3) 13 Q. B. D. 360.
(4) 29 Ch. D. 459.
(5) 17 Ch. D. 301, 320.
(6) Ibid. 329.

from "moral fraud and deceit," nor can there be such a thing as fraud by inference of law: *Joliffe* v. *Baker* (1); *Bellairs* v. *Tucker* (2); *Smith* v. *Chadwick* (3); *Hallows* v. *Fernie* (4). There must be a wilful and fraudulent statement of that which is false to maintain an action of deceit: *Eaglesfield* v. *Marquis of Londonderry* (5); and nothing like this can be attributed to *Derry*, who acted with entire *bona fides*. The Plaintiff can only succeed *secundum allegata et probata*, and he has not alleged, and has failed to prove, that he so read the prospectus that it involved an untruth, that he was thereby induced erroneously to believe in a certain state of facts, and that this belief was a material inducement to him to take the shares: *Symonds* v. *City Bank* (6). Moreover *Derry* took no part in the preparation of the prospectus; he is an innocent director, and co-directors are not the agents of innocent directors for the purpose of committing a fraud: *Weir* v. *Barnett* (7); *Cargill* v. *Bower* (8); *In re Denham & Co.* (9).

Finlay, Q.C., and *M. M. Mackenzie*, for the Defendant *Pethick*:—

(1.) It is not shewn that the Plaintiff acted on the alleged misrepresentation; (2.) Fraud is essential, and there is no fraud; and (3) no damage resulted from the alleged misrepresentation. The Plaintiff knew on the 6th of November, 1884, that the Board of Trade had refused its consent, and if he had been misled he should at once have repudiated his shares and charged the directors with fraud; he not only failed to do this, but he attended a meeting of the shareholders and publicly expressed his confidence in the directors. It is not contended that *Pethick* was guilty of fraud in the sense of making a statement which he knew to be untrue, nor can it be said that he was reckless. He knew that the consent of the Board of Trade was necessary; but he had never known a case in which it had been refused: *Arkwright* v. *Newbold* (10); *Weir* v. *Bell* (11).

(1) 11 Q. B. D. 255.
(2) 13 Q. B. D. 562.
(3) 9 App. Cas. 196.
(4) Law Rep. 3 Ch. 467.
(5) 4 Ch. D. 693, 711.
(6) 34 W. R. 364.
(7) 3 Ex. D. 32.
(8) 10 Ch. D. 502.
(9) 25 Ch. D. 752.
(10) 17 Ch. D. 301.
(11) 3 Ex. D. 238.

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Moulton, Q.C., and *Buckley*, Q.C., for the Defendant *Wakefield*:—

A common law action of deceit or for misrepresentation such as this cannot be supported by a mere error of judgment, but must have a moral basis of some kind. A false statement must mean a statement which, fairly taken in its connection, meant to convey something which was not true; and unless the negligence amounted to wilful blindness the Defendants are not liable. The Plaintiff's case has broken down on every point: *Conniton* v. *Gourley* (Unreported, M.R., July, 1886). They also referred to *Attorney-General* v. *Great Western Railway Company* (1).

Levett, and *Upjohn*, for the Defendant *Moore*.

Hastings, Q.C., and *W. P. Beale*, for the Defendant *Wilde*:—

According to the 34th section of the *Tramways Act*, 1870 (33 & 34 Vict. c. 78), all carriages had to be moved by animal power only, unless otherwise provided by the special Act. Here the special Act did give this company the power or right to move their carriages by steam, but such power or right was not to be exercised until the consent of certain bodies had been obtained. Until the tramway was constructed these consents were not required, and if it had been decided not to use steam-power never would have been required at all. So that in one sense the statement in the prospectus, though it might have been more explicit, was not untrue. It was somewhat analogous to the statement often made that under a settlement "the trustees may sell the property," where in fact the consent of the tenant for life is required. The evidence shews that the directors were confident that the consents would be given, and there was nothing fraudulent in the omission to state that they had not been obtained.

Bompas, in reply, referred to *Reese River Silver Mining Company* v. *Smith* (2).

STIRLING, J.:—

This case has occupied a considerable time in its discussion, but not more, perhaps, than its importance justified; and the

(1) 4 Ch. D. 735. (2) Law Rep. 4 H. L. 64, 79.

length of its duration has given me an opportunity of considering the evidence and the various points in the case. To-day I have had the benefit of a most able and exhaustive reply from Mr. *Bompas*, and I proceed at once to give judgment while the matter is still fresh before me, the questions involved being merely questions of fact.

The action is one which is commonly called an action of deceit, and in order that the person who brings it may be able to maintain it, he must prove several things. First of all, complaining as he does of a statement which he says is untrue, he must prove that the persons whom he sues actually made or are responsible for that statement. Secondly, he must shew that that statement is untrue in fact. Thirdly, he must shew more than that, not merely that it is untrue, but, in the words of the statement of claim, that it was fraudulent. As to what that means and implies I shall hereafter say a few words. Fourthly, he must prove that he acted on that untrue representation and that he has suffered damage.

Now the persons sued are the five directors of the *Plymouth, Devonport and District Tramways Company;* and the Plaintiff complains of statements contained in a prospectus which was issued while they were directors. As to four of the directors, I do not think there has been any dispute as to their responsibility. As to the fifth, there has been some dispute; but, without absolutely deciding the point, I think that at all events a *primâ facie* case of responsibility has been made out. Although the Defendant in question, Mr. *Derry*, did not actually take part in preparing the prospectus, he, nevertheless, after it had been prepared received, as it appears, 100 copies, and actually proceeded to issue those copies. Under those circumstances, I should have great difficulty in drawing a distinction between him and his co-directors; and, therefore, I do not stop to consider minutely the question of his responsibility.

We have next to consider whether the Plaintiff has proved a statement which is untrue in fact; and as to that I must now state shortly the facts of the case. The company in question was a tramway company incorporated by special Act of Parliament; and at the beginning of February, 1883, the directors

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issued a prospectus which stated various things of which the Plaintiff complains. In the first place, at the head of the prospectus was a statement in large type, "Incorporated by special Act of Parliament, 45 & 46 Vict., authorizing the use of steam or other mechanical motive power," and then in the body of the prospectus was this statement, which is partly put in capital letters: "One great feature of this undertaking, to which considerable importance should be attached, is that by the special Act of Parliament obtained, the company has the right to use steam or other mechanical motive power instead of horses, and it is fully expected by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses." Now it is stated (and it is no doubt true) that the Act of Parliament did not confer by sect. 35 an absolute right to use steam or mechanical power. The provisions of sect. 35 are:—[His Lordship then read sect. 35 of the company's special Act.]

The "corporations" referred to in this section are the corporations of *Plymouth* and *Devonport*. It is said, and truly said, that at the time when this prospectus was issued the consent of the Board of Trade had not been obtained, neither had the formal consent either of the corporation of *Plymouth* or the corporation of *Devonport* been obtained.

Now, is this statement in the prospectus true or untrue? It is perfectly clear to my mind that it is not an accurate statement of the legal position of the company. At the time when the prospectus was issued the company had not, and could not have, as it appears to me, the absolute legal right to use steam on the tramway. As it seems to me, according to the terms of the section, the consent of the Board of Trade is a condition precedent to the right; and the right is only to be for a period of seven years, and with the like consent during such further periods not exceeding seven years, as the board may from time to time specify. Further, the consents of the corporations had not in form been obtained. And if I had, as might have been the case, to give a decision in an action brought to rescind the contract with a view of getting rid of the shares, I might have felt very considerable difficulty in coming to a conclusion other than this

—that the statement in the prospectus was not in accordance with the rights of the company.

But that is not the issue which is tendered by this action. It must be shewn not only that a statement is untrue, but also, as I conceive, that it is fraudulent. Now what does that mean? There are some cases in which, no doubt, there is no difficulty in arriving at a conclusion as to whether a statement is fraudulent or not. If a man makes a statement knowing it to be untrue, and believing it not to be true, there is no question that it is a fraud. If he makes a positive assertion without having any belief on the subject one way or the other, that is also fraud. But I think there are *dicta* which go to shew that statements may be fraudulent which do not fall within any of those categories. Perhaps the law on that point is not quite settled yet. The difference of opinion may be very well illustrated by what was said by Lord *Chelmsford* and by Lord *Cranworth* respectively in the well-known case of *Western Bank of Scotland* v. *Addie* (1). That was an appeal from *Scotland*, and there, in the charge to the jury, the Lord President of the Court of Session had told them "that if the case should occur of directors taking upon them to put forth in their report statements of importance in regard to the affairs of the bank false in themselves, and which they did not believe, or had no reasonable ground to believe, to be true, that would be a misrepresentation and deceit." That appears to have met with the approval of Lord *Chelmsford*. He says (2): "I agree in the propriety of this interlocutor, so far as it relates to the exception on the ground of misdirection. In the argument upon this exception the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury upon this direction would have to judge. But supposing a person makes an untrue statement, which he asserts to be the result of a *bonâ fide* belief of its truth, how can the *bona fides* be tested except by considering the grounds of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterised as misrepresentation

(1) Law Rep. 1 H. L., Sc. 145, 161. (2) Law Rep. 1 H. L., Sc. 162.

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and deceit." That is also discussed by Lord *Cranworth*, but, as I read his judgment, he does not quite agree in that view of the case. After referring to the direction of the Lord President, he says (1): "I confess that my opinion was, that in what his Lordship thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care and caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to shew that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence, not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

In more recent times the question has come before the Court in the case of *Weir* v. *Bell* (2), and there Lord Justice *Cotton* says (3): "It is well established that in an action of deceit a defendant may be liable not only if he has made statements which he knows to be false, but if he has made statements which in fact are untrue, recklessly; that is, without any reasonable grounds for believing them to be true, or under circumstances which shew that he was careless, whether they were in fact true or false." Perhaps it is not quite right to take that as an absolute statement of the Lord Justice's opinion, because it must be read in connection with what he said in the case of *Arkwright* v. *Newbold* (4), where he expressly lays this down (5): "This also must be borne in mind, that, in an action for setting aside a contract which has been obtained by misrepresentation, the plaintiff may succeed, although the misrepresentation was innocent; but in an action of deceit the representation to found the action must not be innocent, that is to say, it must be made

(1) Law Rep. 1 H. L., Sc. 168.
(2) 3 Ex. D. 238.
(3) 3 Ex. D. 242.
(4) 17 Ch. D. 301.
(5) 17 Ch. D. 320.

either with knowledge of its being false, or with a reckless disregard as to whether it is or is not true. That difference is material in regard to the question whether or not the plaintiff in this action is entitled to succeed." On the other hand, in *Weir* v. *Bell* (1) Lord *Bramwell* lays it down that, with an exception to which I need not advert, to make a man liable for fraud, moral fraud must be proved against him.

Now I do not think it is necessary for me upon this occasion to consider which of these views, if they do in fact conflict, is the more accurate. Practically it is found that a question which would turn on the distinction between the two very seldom arises; and I propose to deal with this case upon the footing that I have got to consider whether the directors, assuming that they made a misrepresentation, had any reasonable grounds for making the statement which they did.

Now, I confess that at the close of the Plaintiff's case I thought that there were circumstances of great suspicion with regard to these directors. It had been proved that some of the directors at least had received sums of money from the promoters, and it appeared to me that if it had not been strictly proved, at all events there was some ground for inferring, that the prospectus really was the work of the promoters, and under these circumstances one would be led to scan very closely what happened with regard to the issue of this prospectus, to see whether the directors were making statements which they knew to be false, or whether they were making them without any reasonable ground for believing them to be true.

The directors have all given evidence, and I must say, before going further, that it is to be regretted that four gentlemen of mature age, of business experience, versed in the ways of the world, and occupying, all of them, positions of confidence, and some of them positions of dignity, should have permitted themselves to act as they did with reference to the sums they received from the promoters of this company; in the year 1882 above all, when the impropriety of directors accepting sums of money from promoters whom they were bound to watch in the interests of those shareholders whom it was their duty to protect, had

(1) 3 Ex. D. 243.

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become well-known by a series of decisions of this Court. I think that is a most regretable circumstance, and I cannot but think that the directors, in acting as they did, laid themselves open to serious censure, and I have little doubt that their so doing led in great measure to the bringing of this action. Still I am bound to say that they have each of them returned the sums which they so received. I have had the opportunity of seeing them in the box. I have attended as closely as I could to their demeanour and to the statements which they have made there, and the impression which is left upon my mind is this, that however much they may have gone wrong in what they did in reference to those sums which they received, still, as regards this prospectus, I cannot bring myself to believe that any one of them acted with an intent to defraud in any way, or was wilfully dishonest. I think that if any one of those gentlemen had been told by Sir *Henry Peek*, or by any one else, the day after the allotment was made, "You have said in the prospectus something which you had no right to say; you have said you have a right to use mechanical power when you have not," each and every one of them would have stood aghast. I fully believe that each of them thought that the company with which he was connected had the right, as it is put in the prospectus, to use steam.

Now, that does not end the matter. I must further inquire, according to what has been laid down, and in the view which I have proposed to take of the case, did they entertain that belief on reasonable grounds? Now I think I must come to the conclusion that they had reasonable grounds for the belief; at all events, that their grounds for the belief were not so unreasonable as to justify me in holding them guilty of fraud. For what is the state of the case? By the general *Tramways Act* of 1870 (1), it is provided that all carriages used in any tramway shall be moved by the power prescribed by the special Act, and where no such power is prescribed, by animal power only. Therefore, in a general way, unless the right to use mechanical power is conferred by the special Act, it cannot be used at all. That being so, it is of the greatest importance

(1) 33 & 34 Vict. c. 78, s. 34.

that there should be found in the special Act something authorizing the use of mechanical power. Now there is in this Act a section which, subject to fetters and limitations no doubt, does authorize the use of mechanical power. The mere existence of that section shews to my mind that, even subject to the fetters and limitations which are there introduced, Parliament had to a certain extent adjudicated upon the subject and come to the conclusion that this was not a case in which the right to use mechanical power should be absolutely refused to the company. So much I think must be inferred from the Act of Parliament itself. Then, no doubt, there are fetters and limitations imposed by the Act. But I conceive that if any one of these gentlemen had had his attention called to that as shewing that he had no right to assert that the company could use steam, he would have said: "You may be right as a matter of law, but as a matter of business I say the statement is perfectly correct. It is true we have got to get the consent of the Board of Trade and of the two corporations; but as to the consent of the two corporations, we have got that already practically; there is no opposition, and there can be no question that that will be given." Well, was that inference unjustifiable? No, I think not. In fact the corporations shortly afterwards passed resolutions authorizing the use of steam. Then as to the Board of Trade. What was the justification as to the Board of Trade? It is not to be forgotten that, in my view, there is a special power given to the Board of Trade here beyond that which is conferred by the general *Tramways Act* with reference to the inspection and opening of the line. The general *Tramways Act* prohibits the line from being opened until it has been inspected by the Board of Trade and certified to be fit for traffic, but beyond that there is here a duty cast on the Board of Trade of saying whether mechanical power shall be used in the tramway at all. But, after all, was this, as a matter of business, a thing which it was unreasonable for the directors to suppose could be got? The Board of Trade is a public body. It is one of the great departments of state, and the head of it is a public minister. Therefore it does not act in an arbitrary way, and even if it were inclined to do so, it would be under the control of Parliament; and if it had to enforce its decisions, it would also to a certain extent be under

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the control of the law officers of the Crown. But that is not all. The Board of Trade has been in existence for a long time, and its mode of proceeding is well known to everybody who takes any interest in the subject, and it is perfectly well known that it does not proceed in an arbitrary way, and its decisions commend themselves to men of business and to men of experience in regard to railways and tramways, and they know very well that when the duty is cast upon the Board of Trade of considering the opening of the line, the Board will not merely, because it chooses to say so, stop the opening of the line, but will go into the matter, and consider the requirements of the public safety, and that if the Board is satisfied as to that, there is no risk of the requisite consent being withheld. Then, although there was in this case a special duty thrown upon the Board of Trade, it seems to me that the directors might not unreasonably come to the conclusion, as I believe they did, that it was a mere matter of requirements after all—that the Board of Trade would no doubt insist on certain things being done, and on certain things being avoided, but that it was a mere matter of money and expenditure to comply with the requirements of the Board, and that if those requirements were complied with there was no practical danger that the consent would be refused.

Now, in my judgment, having seen the directors and come to the conclusion that they did, every one of them, believe that they had the right stated in the prospectus, am I to say that their belief was so unreasonable, and so unfounded, and their proceedings so reckless or careless that they ought to be fixed with the consequences of deceit? In my judgment I think not. Mercantile men dealing with matters of business would be the first to cry out if I extended the notion of deceit into what is honestly done in the belief that these things would come about, and when they did not come about make them liable in an action of fraud. I cannot, therefore, under these circumstances, come to the conclusion that this was fraudulent in any sense which would render these Defendants liable to an action for deceit.

But then there is another point on which I think it is desirable that I should also express my opinion. Not only must the statement be untrue and fraudulent, but the burden lies on the

Plaintiff of shewing that he relied upon it. Now, the Plaintiff here complains that these fetters, as I have called them, and consents necessary to the existence, it may be, or at all events to the exercise, of the right were suppressed; and that they were suppressed fraudulently, and that he acted on the faith that there were none such. Now, I have already expressed my opinion that the suppression was not fraudulent, or with the intent to secure the taking of the shares. I think it was, as I have already said, the result of the belief, which, whether well or ill founded, I cannot hold to be entirely unreasonable, that the necessary consents would be obtained. But the Plaintiff, in addition, has to take upon himself the burden of shewing that he acted on the faith that those fetters did not exist. It lies with him to prove that, and the evidence in support of this part of the case is mainly that of Sir *Henry Peek* himself. The way in which Sir *Henry Peek* gave his evidence entirely commended itself to my mind. His evidence was given most candidly, and was free from the slightest tinge of exaggeration; and if the issue had simply been, did he rely on the statement in question, and there had been nothing more, I think I should have come to the conclusion that the statement in the prospectus that the company had the right to use steam-power had a material influence upon his mind. He does not profess that that was the sole motive which induced him to take the shares, but in the beginning of his evidence, he says "I am of *Devonshire* extraction, and I have a house there." . . . "I know *Plymouth*, *Stonehouse*, and *Devonport*, very well. There are a great many workmen who pass to and fro, and if a tramway would pay a moderate dividend anywhere I thought it was likely it would pay there; and having this steam-power, it made, as I said before, £2 per cent. difference. In the case of one making £4 per cent., with the £2 per cent., it would be £6 per cent. And more than that, I applied for the shares after having particularly made inquiry as to the character of the directors, and especially of Mr. *Derry*. I understood that Mr. *Derry* was a most respectable man, and, indeed, had filled some of the highest offices in the corporation." Then in the course of his cross-examination this question was put to him: "Am I to understand that the reason why you put £4000 into the undertaking was because

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of the considerable inquiries you had made, and finding that the undertaking was well thought of at *Plymouth*?" His answer was: "I have told you the reason why I put that in; first of all, because I believed there was a considerable traffic between the three towns; and, secondly, that they had the means of working the tramway in a more economical way than most tramways; and, thirdly, that Mr. *Derry*, and with him, I take it, the directors, were respectable men, who would not put anything in the prospectus but what they knew to be correct." It appears, therefore, that Sir *Henry Peek* had formed the opinion (whether that opinion is sound or not is immaterial) that the use of mechanical power was an important feature in any tramway; and that its use would effect a saving of 2 per cent. He says that this paragraph being printed in capitals struck his eye, and therefore amongst the motives which induced him to take the shares was this, that they had the means of working the tramway in a more economical way than most tramways. Therefore, I think that the existence of this paragraph had a material influence upon the mind of Sir *Henry Peek* when he applied for the shares.

But that is not the whole question. What he complains of is that the fetters with which this right was surrounded were not disclosed to him; and I have to determine upon this evidence whether really the absence of that disclosure was material to Sir *Henry Peek*. Now, he is, as he has told us, a busy man. He receives a great many letters every day and he is much absorbed in business, and he has, in answer to a great many questions, very candidly said that he does not remember what took place. That absence of recollection is in some cases, no doubt, the refuge of a person who seeks to avoid giving an answer; but that I am perfectly certain is not the case with Sir *Henry Peek*, but is the real truth. His business occupations and the numerous matters to which he has to attend render his memory imperfect; and in the present case there is a striking instance of it, for when he was shewn in the book the form of application upon which the company allotted him the shares it appears it is not signed by himself. His memory would have led him to say, no doubt, that he signed it himself. I have no doubt that the application produced was the one on which the company acted, and the one sent on his behalf,

and the conclusion which I come to from that is that Sir *Henry Peek's* memory with reference to this transaction cannot be entirely relied on. But further than that, we see that Sir *Henry Peek* is not a very critical reader of prospectuses, for in cross-examination I find this: "You have stated in the 5th paragraph of your statement of claim, the 35th section of the Special Act. Now having made the inquiries of Sir *Robert Carden's* firm and the inquiries at *Plymouth*, if that section had been set forth in the prospectus, what influence would it have had on your mind?—I do not suppose it would have had any influence. It would have fallen like water on a duck's back. I did not know what the section was."

"But if it had been set forth in the prospectus it would not have influenced you in any way?—I do not suppose I should even have read it. The statement was absolute that the special Act had been got."

So that it appears from that that Sir *Henry Peek*, without devoting himself to studying the prospectus very closely, would, in all probability, have taken the shares even if the section of the Act had been set out there fully.

But it does not altogether rest there. Sir *Henry Peek* comes here now charging the directors with having deceived him by suppressing the fetters and limitations which were imposed by the Act; and it is most material to consider how he dealt with them when this suppression first came to his knowledge. That is proved to us by what took place at the meeting of the 6th of November, 1884, at which time it is not denied that Sir *Henry Peek* knew of the fact that the consent of the Board of Trade was required, and at the meeting of the shareholders upon that occasion he made a speech which I cannot treat otherwise than as a public expression of confidence in the directors, and I am quite sure that if Sir *Henry Peek* had at that time thought that they had been guilty of a false and fraudulent misstatement in that prospectus, he would have been the first man to have got up in that meeting and have said so. No doubt the speech is open to the comment already made on it, that it shews that the information as to the right of the Board of Trade had come upon Sir *Henry Peek* with surprise, and that he was not satisfied with what

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had taken place. But after all, and making every allowance for that, I cannot come to the conclusion that Sir *Henry Peek* is a man who would, if he had really thought that the characters of directors were such as they would be held to be if this action had succeeded, would have got up in a public meeting and expressed such confidence in them.

But the matter does not quite rest there. In Sir *Henry Peek's* re-examination this question was put to him: "But supposing instead of this statement that they had the right to use steam power there had been in its place the statement in the Act of Parliament that they could use steam-power for seven years, if the consent of the Board of Trade and the corporation of *Plymouth* and the corporation of *Devonport* was obtained, would that have affected your opinion with regard to the steam?" and his answer was: "Yes, if my attention had been called to anything of that sort. I intended to hold those, not to sell them, and if there had been any different circumstances at the end of seven years I should have looked at it with a critical eye. I do not mean to say I should or should not have taken those shares, but I should have looked at it critically under those circumstances. I always do." Now I cannot read that as a statement by Sir *Henry Peek* that, in the words of his own statement of claim, had he known the contents of the Act he would not have applied for the shares. To my mind it falls very far short of that, and it merely amounts to a statement that Sir *Henry Peek* would have looked at the matter a little more closely.

It seems to me that on those grounds Sir *Henry Peek* has not proved that which it was necessary for him to establish in order to make out that he was entitled to the relief which he asks. It appears to me that the real root of this action is what Sir *Henry Peek* said himself—that at the time when he made that speech he had not lost confidence in the directors, but that the facts which subsequently came to his knowledge—probably those relating to the money received by the directors from the promoters—were those which led him to suppose this paragraph was fraudulent. I think he has not succeeded in establishing that, and therefore that the action fails; and having now, after the whole matter has been discussed and investigated, come to the conclusion which I

have as to the conduct of the directors, I must dismiss the action, and must dismiss it with costs.

W. W. K.

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From this judgment the Plaintiff appealed. The appeal came on for hearing on the 14th of November, 1887.

Bompas, Q.C., and *E. W. Byrne*, for the Appellant:—

Directors who put into a prospectus a statement which they know not to be accurately true at the time they make it, do so at their own risk; and if they have over-estimated their position and it turns out that they have not something they represented themselves to have, they are liable to the person who was induced to take shares on the faith of that representation, even although they felt convinced that they would obtain what they represented themselves to have, and made the statement without fraudulent intent: *Polhill* v. *Walter* (1); *Smith* v. *Chadwick* (2). So that an action of deceit may be brought against a person to whom dishonesty cannot be imputed, and whose recklessness does not amount to that of a man who does not care whether he speaks the truth or not. All that is necessary for the Appellant to prove is the untrue statement, that it was likely to influence him to take the shares, and that he did take them; for it has been laid down that "if there is a material representation calculated to induce a person to enter into the contract, it is an inference of law that he was induced by the representation to enter into it": *Redgrave* v. *Hurd* (3); *Rawlins* v. *Wickham* (4); *Mathias* v. *Yetts* (5).

The burden is upon the other side to shew that the statement had no effect upon the mind of the Appellant. The Defendants say that the prospectus may bear a different meaning from that which the Plaintiff attributes to it; but the question is what an ordinary reader would understand by it: *Hallows* v. *Fernie* (6); *Twycross* v. *Grant* (7); *Arkwright* v. *Newbold* (8); *Peek* v. *Gurney* (9); *Weir* v. *Bell* (10); *Western Bank of Scotland* v. *Addie* (11);

(1) 3 B. & Ad. 114.
(2) 20 Ch. D. 27.
(3) Ibid. 1.
(4) 3 De G. & J. 304.
(5) 46 L. T. (N.S.) 497, 502, 505.
(6) Law Rep. 3 Ch. 467.
(7) 2 C. P. D. 469.
(8) 17 Ch. D. 301.
(9) Law Rep. 6 H. L. 377.
(10) 3 Ex. D. 238.
(11) Law Rep. 1 H. L., Sc. 145.

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Edgington v. *Fitzmaurice* (1). All the Defendants are equally liable; they knew the real state of facts, and they assented to the prospectus being issued, although they may not all have had a hand in preparing it.

W. Pearson, Q.C., and *Seward Brice*, Q.C., for the Defendant *Derry*:—

The action is an action for deceit; it is based upon the allegation of fraud in the Defendants, and if the Plaintiff cannot prove fraud he cannot succeed: *Weir* v. *Bell* (2). He charges against the Defendants that they made false statements of fact in the prospectus, and that they did so knowing them to be false, or at least recklessly, without reasonable ground for supposing them true. The Plaintiff has not succeeded in establishing either of these propositions. The prospectus did not state as a fact, and was not intended to be understood as stating as a fact, that the company had absolute authority at the time to use steam-power without any further consent of the Board of Trade, but that they were within that class of tramways which had the power of using steam if they complied with the provisions of the statute. They referred to their Act, and supposed that the prospectus would be read in conjunction with it. So far as the words of the prospectus go they may be ambiguous. It was resolved by the directors that the second prospectus should be on the basis of the first, and if it varied from it *Derry* is not responsible, for he was not present at the meeting which issued it, and never saw a copy of it till after the Plaintiff had applied for shares: *Cargill* v. *Bower* (3). But if the statements are shewn to be false, there is no proof that the Defendants knew they were false, or that they made them so recklessly as to be equally responsible as if they had known. On the contrary, they had reasonable ground for supposing that they were substantially true; they really expected to get the consent of the Board of Trade to the use of steam: *Western Bank of Scotland* v. *Addie* (4). Therefore we say that the Plaintiff has not shewn that the Defendants were guilty of fraud and cannot sustain the action. But we also say that the

(1) 29 Ch. D. 459.
(2) 3 Ex. D. 238.
(3) 10 Ch. D. 502, 513.
(4) Law Rep. 1 H. L., Sc. 168.

Plaintiff was not induced to take the shares by the statements in the prospectus. He has not stated so in his evidence; he only says that the right to use steam was one of the circumstances that induced him to take them. It is clear that he relied on the character of the chairman and the directors, and at the meeting of the 6th of November, 1884, he still expressed confidence in them.

Finlay, Q.C., and *M. M. Mackenzie*, for the Defendant *Pethick*:—

If the necessity for the consent of the Board of Trade had been referred to in the prospectus, the Plaintiff would have taken the shares just the same. The Plaintiff cannot shew that any damage was caused to him by the misstatements in the prospectus; for the failure to obtain permission to use steam-power was not the real cause of the collapse of the company. The Plaintiff cannot succeed in this action unless he can prove dishonesty in the Defendants, and this he has failed to do: *Edgington* v. *Fitzmaurice* (1).

Hastings, Q.C., and *W. P. Beale*, for the Defendant *Wilde*.

Moulton, Q.C., and *Buckley*, Q.C., for the Defendant *Wakefield*.

Levett, and *Woodfall*, for the Defendant *Moore*.

Bompas, in reply, referred to *Burrowes* v. *Lock* (2); *In re Denham & Co.* (3); *Slim* v. *Croucher* (4); *Bigsby* v. *Dickinson* (5).

COTTON, L.J.:—

This is an appeal from Mr. Justice *Stirling*, who dismissed the Plaintiff's action. The action is one which is commonly called an action of deceit—a mere common law action. It is brought against all those who were directors of the *Plymouth, Devonport and District Tramways Company* at the time when the prospectus was issued. The ground of the Plaintiff's complaint and of his contention that he is entitled to damages, is, that there were

(1) 29 Ch. D. 482.
(2) 10 Ves. 470.
(3) 25 Ch. D. 752.
(4) 1 D. F. & J. 518.
(5) 4 Ch. D. 24.

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misstatements in that prospectus by which he was induced to act to his prejudice by taking shares for which he paid £4000, and which are much less valuable now, because the company is wound up.

Now, before I go into the facts of the case, I think it the best course to state what, in my opinion, is the law with reference to such actions, and what the circumstances are in which a defendant in such an action will be made liable. What, in my opinion, is a correct statement of the law is this—that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false—that is, without any reasonable ground for believing it to be true—he is liable in an action of deceit at the suit of any one to whom it was addressed and who was materially induced by the misstatement to do an act to his prejudice. That, in my opinion, is the law, and it is in accordance with what I have stated in several cases referred to in the judgment of Mr. Justice *Stirling*, nor do I think that he expressed an opinion in any way dissenting from that.

But we cannot forget the argument or omit reference to the authorities which were much relied upon in this case by the Defendants, namely, that in order to make a man liable in an action of deceit, which is grounded on fraud, it must be made out that the person making the statement was fraudulent in so making it. Of the cases referred to by the Defendants the principal, I think, were those in which Lord Justice *Bowen* and Lord *Bramwell* gave judgments. Lord Justice *Bowen*, in a case which was before this Court here of *Edgington* v. *Fitzmaurice* (1), no doubt does state this: "Secondly, it is said that the prospectus contains an implied allegation that there was no other mortgage affecting the property except the mortgage stated therein. I think there was such an implied allegation, but I think it is not brought home to the defendants that it was made dishonestly; accordingly, although the plaintiff may have been damnified by the weight which he gave to the allegation, he cannot rely on it in this action." That, certainly, taken alone, supports strongly the contention on behalf of the Defendants that there must be

(1) 29 Ch. D. 482.

actual fraud and dishonesty. But then you must look and see what Lord Justice *Bowen*, in the previous part of his judgment, stated, in his opinion, would be dishonest, for we find this (1): "The loss which the plaintiff sustained is not disputed. In order to sustain his action he must first prove that there was a statement as to facts which was false; and, secondly, that it was false to the knowledge of the defendants, or that they made it not caring whether it was true or false. For it is immaterial whether they made the statement knowing it to be untrue, or recklessly, without caring whether it was true or not, because to make a statement recklessly for the purpose of influencing another person is dishonest." So that when he says there must be dishonesty, you must look back to the former part of his judgment to see what, in his opinion, would be dishonesty.

The only other passage which I will refer to is that of Lord *Bramwell*, whom, I think, Mr. Justice *Stirling* seemed to consider to entertain an opinion rather opposed to that which I have already expressed in this case, and in cases to which Mr. Justice *Stirling* referred. Those observations of Lord *Bramwell* are his observations in *Weir* v. *Bell* (2). What he says is this (3): "I am of opinion, with an exception I will presently advert to, that to make a man liable for a fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else, except where some duty is shewn and correlative right, and some violation of that duty and right."

Now I do not propose to enter into a discussion as to whether legal fraud is a happy expression. It is not one which I should adopt; but the question is whether there is not a duty on the part of those who make statements to be acted upon by others, and whether there is not a right in those persons to whom the statements are made. In my opinion there is a duty. When a man makes statements which he desires that others should act upon, especially when they are in a prospectus like the present, intended to be circulated among the public in order to induce

(1) 29 Ch. D. 481. (2) 3 Ex. D. 238.
(3) 3 Ex. D. 243.

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them to take shares—in my opinion there is a duty cast upon the director or other person who makes those statements to take care that there are no expressions in them which, in fact, are false; to take care that he has reasonable ground for the material statements which are contained in that document which he prepares and circulates for the very purpose of its being acted upon by others. And although, in my opinion, it is not necessary that there should be what I should call fraud, yet, in these actions, according to my view of the law, there must be a departure from duty; and in my opinion when a man makes an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true, he makes default in a duty which was thrown upon him from the position he has taken upon himself, and he violates the right which those to whom he makes the statement have to have true statements only made to them. And I should say that when a man makes a false statement to induce others to act upon it, without reasonable ground to suppose it to be true, and without taking care to ascertain whether it is true, he is liable civilly as much as a person who commits what is usually called fraud, and tells an untruth knowing it to be an untruth. And although the expressions of opinion by Lord Justice *Bowen* and by Lord *Bramwell* in those cases to which I have referred do, *primâ facie*, support the argument on the part of the Respondents here, yet, in my opinion, they are not inconsistent with what I have stated to be, and what I consider to be, the law applicable to cases like the present.

Having stated that, let us go to the facts of this case. The first point which was argued by Mr. *Pearson*, and which I think it may be convenient to consider, is this. Who were responsible for issuing this prospectus? There was only one Defendant who contended that he was not answerable; I am not speaking of the liability to the Plaintiff in this action, but who must be considered as liable in this sense, as having made that statement with the consequences, whatever they may be. Mr. *Derry* was the only one who contended that he was not answerable for issuing this prospectus. Now, as far as I understand, the point of Mr. *Pearson's* argument, which was pressed upon us very ably, was this:

that he never saw the draft of this prospectus before it was issued. He was present at a meeting of the 24th of January, 1883, the prospectus being issued at a meeting of the 29th of January, and what he authorized at the former of these meetings was the issue of a prospectus on the basis of a former prospectus which had not contained the statement in exactly the same form, but materially different, I think, from that which is contained in the present prospectus. Then he went home to *Plymouth*, and what happened? On the following Tuesday, which was the 6th of February, he got a bundle of these prospectuses, one hundred in number. It is true that the prospectus on which the Plaintiff had acted had been issued before that. That is the conclusion I come to. His application for shares was on the 7th. But what is the course adopted by Mr. *Derry?* He does not suggest that he did not see the prospectus, and he must be taken to have seen it. He does not in any way object to it. He does not write and say, "this prospectus is not what I authorized and I cannot adopt it as my prospectus." He circulates and hands over to others some of those prospectuses which were sent down to him. From his never objecting to this prospectus, and from the conduct which he adopted as regards the copies of the prospectus sent to him, I come to the conclusion that, even if this prospectus was not in accordance with that authority given by him on the basis of the former prospectus, the prospectus of the previous year, yet he adopted it, and by his act shewed that he recognised it as a prospectus duly in accordance with his directions given at that meeting, and he must be answerable for the consequences of this prospectus just as if he had been present and seen this prospectus when it was finally prepared and before it was issued at all. It is very true—and it was well urged upon us—that the prospectus on which the Plaintiff acted must have been issued before Mr. *Derry* actually saw the prospectus; but if he recognised it as his and adopted it as his, in my opinion he must be as liable as any of the other directors, who do not urge that they did not recognise or issue this prospectus.

Then the next point to be considered is what in fact is the statement which is relied upon as misleading? I think there are two statements relied upon. First, there is the heading of

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this prospectus, which was of the 29th of January, 1883. It was this: "Incorporated by special Act of Parliament 45 & 46 Vict. authorizing the use of steam or other mechanical motive power." That was not so much relied upon, and might, I think, be explained away. What was really relied upon was this: "One great feature of this undertaking, to which considerable importance should be attached, is that by the special Act of Parliament the company has the right to use steam or mechanical motive power instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line, as compared with other tramways worked by horses."

Now, what was the position of things at this time? By the general Act, unless the special Act authorized it, no motive power could be used except horses. In the 35th section of the special Act there was a provision that "carriages used on the tramways may, subject to the provisions of this Act, be moved by animal power, and, with the consent of the Board of Trade during a period of seven years after the opening of the same for public traffic, and with the like consents during such further period not exceeding seven years as the said board may from time to time specify in any order signed by the assistant-secretary or secretary, by steam-power or any mechanical power." It might be said, and it was said in argument that the general Act divided tramway companies into two classes, viz., those which could only use horse-power and those which could also use steam-power; and that this ought to be read as bringing this company within the division of companies which are freed from the restrictions in the Act of 1870, and have got themselves put by Parliament into another position; of being in the second class of tramway companies, which could use not only horse-power but also steam-power. But can that be said to be the meaning of this statement? In my opinion it cannot, because it does not speak of this as an Act of Parliament removing the restriction of the general Act, and as giving them power probably to obtain authority to use steam-power, but it speaks of the company having the right, which must, in my opinion, be the then present right, at the time when the prospectus was issued, to use steam-power. It does not state that, if they get authority from the Board of Trade to use this,

then the probable result will be that the working expenses will be greatly diminished, but speaks of this right to use steam-power as that which is so within the power of the directors that by that means the company will as a fact, and not as a mere prospective probable advantage, be enabled to reduce considerably the working expenses. That agrees with the heading, which points out, not that it is a company which is allowed by Act of Parliament to get this power, but speaks of it as a company which actually, in fact, has the power to do that which will be a considerable saving of expense, and will make it, therefore, a much more profitable company than it would otherwise be. That in my opinion is the real meaning, and the fair construction of that statement contained in the prospectus.

As far as I see, the great contention on behalf of the directors was not that which I have suggested might be the construction, but it was partly this, that the mere approval on behalf of the Board of Trade of the plans which were submitted to them was equivalent to giving the consent required by that section; and this, I think, is what was adopted by Mr. Justice *Stirling*, viz., that it was so probable that the Board of Trade would give the consent that the directors were justified in making this statement. Now, as regards the latter point, I do not think the probability that they would obtain this authority from the Board of Trade is equivalent to the statement which was made. If such a statement had been made, there could have been no question. Of course, they are not liable for merely expressing an opinion which they might well and honestly entertain, and I think probably did entertain, that the Board of Trade would grant their consent. But the statement is not to that effect, but is, in my opinion, a statement that they have, at the present moment, power to use steam.

I think that contention cannot assist the directors in such a matter as this, where the statement is of a positive fact. I think the Plaintiff has a right to insist that the Defendants are liable for the ordinary meaning of the words used, because, however much people in their own minds may mean to qualify their statements, if a man makes a statement which, according to its ordinary meaning, bears a particular construction, he, in

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my opinion, is liable to those who, reading it and construing it reasonably, do put upon it the primary meaning and the fair construction of the words used. And here we find on the evidence (and I think Mr. Justice *Stirling* relied on the Plaintiff's statement) the Plaintiff does state in his evidence that he did treat this as a statement that the company had the absolute right to use steam power for the purposes of locomotion.

Then it was said that the plans were approved of by General *Hutchinson*, as the Board of Trade had to approve of the tramway, and that therefore really prevented this from being a misstatement, because the Board had approved of the plans, and they had practically given their consent, and that the Plaintiff must have known that their approval of the line must be obtained. Now, in my opinion, the approval of plans really goes for nothing, because that is only that they approved of the course shewn by the plans which were deposited; and as regards the consent—or approval, rather—of the Board of Trade before the line could be opened for use, that is an entirely different matter from the consent which was required by the section to which I have referred What the officers of the Board of Trade are to do before the line can be opened is, to see that the powers given by the Act of Parliament have been properly exercised—that the line has been properly constructed, with due regard to the safety of the public. But independently of that, there is something more required by this section—not that the Board of Trade should see that the powers given by the Act have been duly carried into effect, but that it is right and proper, having regard to the circumstances which have come before them, that the company should have the right to use steam; and that is an entirely different thing from seeing whether the company has duly exercised the powers given; it is to see whether in addition to those powers which are given, and which they are to see have been duly exercised, they are willing (for on them is cast the responsibility) that the company should have an additional power beyond that which a company of this kind generally has. It is true that Parliament gives to them the power of considering it, and, therefore, takes it out of the class prohibited by statute from exercising this right of using steam-power; but it does not give the power unless and

except so far as the board may independently say that the power may be exercised.

I have come to the conclusion (I think not differing from Mr. Justice *Stirling* in that) that this was a statement that they had at that moment the absolute power, without any restriction, to use steam for the purpose of propelling their carriages, and that this was false.

Then we must consider this further point, which, of course, it is necessary for the Plaintiff to make out. Had the Defendants reasonable ground for believing the statement to be true? What is said by the Defendants? Some of the Defendants say that they knew what the rights were, and they knew that no consent had been given by the Board of Trade. There was one gentleman, Mr. *Moore* I think, who says that he acted on the statements of, and trusted to the solicitors, who seem to have prepared the prospectus. Now, as regards those persons, who actually knew the facts, if the statement bears the construction which I think it does, and which I put upon it, it cannot be said they did not know that the statement they were making was untrue. As regards Mr. *Moore*, had he reasonable ground for believing the statement to be true? If this had been a clause which he said he had read, and did not understand, and asked the solicitor its meaning, the case would have stood very differently. But I think this is what his meaning must be—that he accepted this prospectus, prepared by the solicitors, without investigation, but trusted that they would not state anything which was not right. But that, in my opinion, is not a reasonable ground for making such a statement. For, if he had looked at the Act—and he must have known it was in the Act—he would have found, not a section the construction of which required the legal advice of the solicitors, but he would have found it clear that the company had only the right at the present moment to use horse-power, and that they could not get the right to use steam-power unless something further was obtained, namely, the consent of the Board of Trade.

Then there are others who seem to have acted in this way—that they did not trouble themselves about the matter. But I think no one can stand in a better position than Mr. *Moore*.

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None of those who say they did not know what it was took any means to ascertain what was in the Act of Parliament. One gentlemen, indeed, says he thought the consent had been obtained, but he does not state any sufficient reason for believing it.

I understand Mr. Justice *Stirling's* view with regard to the reasonable ground to be this. He thought that they had reasonable ground as men of business for believing that in fact this consent of the Board of Trade would be obtained. I think if it turned upon that I should agree with him. Probably they would expect this, although some of them afterwards thought it would not be desirable that steam-power should be employed upon the line. I do not rely upon that. But I think they may have thought the Board of Trade would probably grant it. That, as I say, does not make true that statement which in fact they made, although a very little alteration would have made the statement which they made true in fact, if they had only said, "subject to the consent of the Board of Trade." Then there would not have been that misstatement, and it could not have been said that by any misstatement on their part the Plaintiff had been induced to take the shares.

But Mr. Justice *Stirling* has decided on another ground in favour of the Defendants. Was the Plaintiff induced by this statement to take the shares? Now I think here one must state a further point of law with reference to a matter like this. As I understand the law, it is not necessary that the misstatement should be the motive, in the sense of the only motive, the only inducement to the party who has acted to his prejudice so to act. It is quite sufficient if the statement is a material inducement to the party to act upon it. Of course it would be almost impossible to say it was the only inducement. There must be so many matters which enter into a man's mind in considering whether or no he shall take shares or whether he shall do any similar act. But, in my opinion (and I need not refer to the *dicta* of various Judges which have been to the same effect), it is quite sufficient if it is a material inducement to the party who has suffered loss to take the shares. I am not certain that Mr. Justice *Stirling* came to a conclusion at variance with this —that it was a material inducement. I think he does come

to that conclusion, because he states in his judgment that the Plaintiff was of opinion that having steam-power would add very materially to the profits of the company; and I think Mr. Justice *Stirling* came to the conclusion that it was a material inducement to the Plaintiff to take the shares. But the view he took was this: that this statement was made an untrue one by not stating that the consent of the Board of Trade was necessary before the power could be acquired, and that if that had been mentioned in the prospectus it would not have affected the Plaintiff. Now why does he think that? The Plaintiff stated that if that clause had been recited in the prospectus, and given *in extenso* in the prospectus, he probably would not have read it. In my opinion, if the prospectus had stated the clause, the matter would have been on an entirely different footing. I should be very unwilling to hold that a man who had the clause in the prospectus with this statement before him could say that he believed the statement in the sense in which the Plaintiff did believe it, and in which I think the Judge thought he believed it. If the clause had been stated the meaning would be that this is the expression of the opinion of the directors of what the consequences would be, because they believe the Board of Trade will certainly grant the authority. But that would be a very different prospectus from the prospectus which we have before us, where there is no statement at all of the clause of the Act, and nothing but this statement, which any one to whom the prospectus was shewn was at liberty to take and read in that which, in my opinion, is its proper meaning construed fairly.

Then I think also Mr. Justice *Stirling* considered that the Plaintiff was to some extent careless in reading it. But then Mr. Justice *Stirling* says that he relies on the evidence given by the Plaintiff, and that he gave his evidence with great fairness, not wishing, or intending, or trying to exaggerate matters. If Mr. Justice *Stirling* had come to a different conclusion as to the reliance which he ought to place on the statement made by the Plaintiff the matter would stand entirely differently, because I think it would be wrong for a Judge who has not seen the witness to draw a conclusion contrary to that which the Judge who had seen and heard the witness had drawn. But here he says he

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entirely relies upon the statements made by the Plaintiff, and therefore we are differing from him not as regards the reliance and credit to be placed on the Plaintiff, but on what is the proper inference to be drawn from certain facts which the Judge thought were established.

Then there is another matter on which I find the learned Judge relied. It was this: the Plaintiff was asked in re-examination what he would have done if he had seen that the Board of Trade would only allow the power for seven years, and it might be renewed for another period of seven years. He said, "Well, I should have carefully considered the matter." But the Judge did not ask him, and he was not asked, "What would you have done if you had known that the company had not got the power at all at the time?" That is the question. But he does state that he read and understood the prospectus as I think the statement ought to be read and understood, and that that was a material inducement to him to take these shares. Then the mere question as to whether he would have read the clause if it had been there, making it a very different prospectus, is a matter not now to be decided in this action, and the question as to what he would have done with reference to the limited period of the power given by the Board of Trade, in my opinion cannot prevent us from applying the law to this particular case, where we do find that a statement in fact not correct was a material inducement to him to take the shares.

I think there is only one other point which I ought to refer to in differing from Mr. Justice *Stirling*, that is his reliance on the conduct of the Plaintiff at the general meeting in November, 1884. No doubt that was a material point, and it struck me as one in favour of the Defendants. They say: "How was it if the Plaintiff thought he had been deceived by a misstatement made by these Defendants that at that meeting when he knew that they had not got the sanction of the Board of Trade he expressed himself as he did as having full confidence in the directors?" Undoubtedly he could not after his action at that meeting have set aside this contract to take the shares. But it is a different question here. It is a question as to whether he has precluded himself from bringing this action against the directors.

He has not precluded himself, but his conduct there I think was fairly used as an argument that it would shew that he had not considered himself in any way deceived. But we must remember that at that time there was a prospect that the directors would get the sanction of the Board of Trade, and I think the Plaintiff might reasonably, even if he considered himself deceived, express his confidence in the management of the directors and in what they were going to do for the best for the company in order to get this power from the Board of Trade, and he might wish to support them so as to give them a better chance of enabling them to get that. I do not think that Mr. Justice *Stirling* relied upon his conduct at that meeting as shewing that the Plaintiff ought not to be believed when he said that he relied on the statement in that sense in which, I think, it ought to be read. If he had disbelieved the Plaintiff I have already expressed my opinion that I could not differ from him, whatever my own view might be on the written evidence. But, I think, his conduct at that meeting may well be explained, and probably is attributable to the circumstances to which I have referred, and does not shew that he did not at that time think that he had been deceived by the directors.

I ought to refer to one other matter which was pressed upon us by Mr. *Finlay*, which was this—that the collapse of the company was not in any way caused by the want of a right to use steam-power. I do not think that is an answer to the Plaintiff's case. It may be that the want of that right was a material ground for their not getting the capital which they required. But that is not the question. The question is this—whether in reliance on the statements made by the Defendants, which were incorrect, the Plaintiff has done an act to his prejudice. He took the shares. Undoubtedly the shares have been a bad concern—ruinous and a great loss, and it is not a question whether the company was ruined by want of the steam-power, but whether he took the shares, believing that in fact the company had that power when it had not that power; and therefore, in my opinion, it is not material to consider whether the collapse of the company was or not caused by it not having the right to use steam-power.

That being so, the Defendants must be held liable. It is not

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that I attribute to them any intention to commit fraud, but they have made a statement which was incorrect, to induce the Plaintiff to act upon it without any sufficient reason for making that statement, without any sufficient reason for believing it to be true. Therefore they are liable. Then what ought the judgment to be? It is said on the part of the Defendants that the Plaintiff has not made out what the loss is. Well he has made out a *primâ facie* case; that is to say, he has shewn, I think, on the evidence that the shares are of very much less value than the sum which he gave for them. He gave £4000, and the company is being wound up. There was a witness, though only one, who said that the shares, which are £10 shares, are not worth more than £5. I think the Defendants are not bound by that; but what I think is the proper course will be to declare that the Plaintiff was induced by a misstatement in the prospectus to take the shares and that the Defendants are liable under the circumstances for any loss which he has sustained by taking the shares, and that will be the difference between the sum given for the shares, £4000, and the value of the shares.

The question will be, should it be the present value or the value at the time when the action was brought? If the parties desire it, the point may be argued at a future time. We must now declare the Plaintiff entitled to recover damages from the Defendants.

SIR J. HANNEN :—

I entirely agree in the judgment which has been delivered by Lord Justice *Cotton*, and particularly with his statement of the law with which he commenced that judgment. But I will add my own statement of the principle, which I believe does not materially differ from his. I take the law to be that if a man takes upon himself to assert a thing to be true which he does not know to be true, and has no reasonable ground to believe to be true in order to induce another to act upon the assertion, who does so act and is thereby damnified, the person so damnified is entitled to maintain an action for deceit.

Having so stated the principle I will proceed to consider the various questions which arise in this case, and it will be

convenient to do so in the order in which Mr. Justice *Stirling* has dealt with them.

The first question is, supposing that the Plaintiff is entitled to recover at all, who are the persons responsible? Well, no serious question has been raised with regard to any one but the Defendant *Derry*, and, with regard to him, it has been said that this prospectus which is complained of was in the first place issued without his having seen it, and therefore he cannot be said to be responsible for it. But it appears that it was prepared in consequence of an authority given by him that a prospectus should be prepared upon the basis of the former prospectus. It is not necessary to enter into the question whether this is on the basis of the former one or not. I think, however, that it is. But this appears to be the fact, that before the Plaintiff did anything in consequence of his having received this prospectus it was communicated to Mr. *Derry*, and, of course, the question would be whether or not he sanctioned and approved that prospectus. It appears to me the evidence is quite conclusive that he did. In order to judge of that you may look at his subsequent conduct. He made no objection to this prospectus, and he made use of it by circulating it amongst his friends. I think, therefore, that he adopted it, and is consequently responsible for any mischief which may have arisen from its circulation; and, in fact, that was the conclusion at which Mr. Justice *Stirling* arrived, and our judgment therefore is in accordance with his opinion.

The next question is whether the statement contained in that prospectus was true. It has been contended on behalf of some of the Defendants boldly that it was; but I confess I am quite unable to understand how that can be successfully maintained. I must read again the passage which is chiefly relied on: "One great feature of this undertaking, to which considerable importance should be attached, is that by the special Act of Parliament obtained the company has the right to use steam or mechanical motive power instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses." It is to be noted that so much importance is attached to this that it is printed in capitals to attract the attention of

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readers, and obviously to influence their minds by this positive statement.

Now it has not been, and cannot be, contended that there was any such absolute right. It was only a right in the event of the Board of Trade approving of the use of steam upon the line. If it had been truly stated it would have been only that they had an expectation of obtaining the power to use steam or other mechanical power. But upon this point the judgment of Mr. Justice *Stirling* is against the Defendants (I am now only upon the question whether or not it is a true statement), for he says: "First of all, is this statement in the prospectus true or untrue? To my mind it is perfectly clear that it is not an accurate statement of the legal position of the company," and in that I entirely concur, and am unable to see how it was possible to argue that it was a correct statement.

Then arises that which is the main question in this cause, whether or not this, which Mr. Justice *Stirling* calls an inaccurate statement, is one made under such circumstances as to make the Defendants responsible for the consequences of other persons having acted upon it. Mr. Justice *Stirling* says, and I think what he says may be true, that perhaps the law on this point is not quite settled yet, and he refers, as well illustrating the point upon which differences of opinion have arisen and may remain to be settled, to two judgments, the one of Lord *Chelmsford* and the other of Lord *Cranworth* in the *Western Bank of Scotland* v. *Addie* (1). I will not read the judgment of Lord *Chelmsford*, because that appears to me to support the principle which I venture to think is the correct one. I only wish to call attention to the language of Lord *Cranworth*, which is supposed to indicate a different opinion on his part. He says (2): "If persons in the situation of directors of a bank make statements as to the condition of its affairs which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed." Now I think that, if it is a matter of opinion, then there is of course ample room for discussion on

(1) Law Rep. 1 H. L., Sc. 145. (2) Law Rep. 1 H. L., Sc. 168.

the question whether or not that opinion was reasonably formed. But, if it is a statement of a fact, very different considerations arise. It appears to me that this is a statement of fact. Can anybody reading this section come to any other conclusion than that which Mr. Justice *Stirling* himself has come to, that the prospectus does not correctly set forth the substance of the Act? There have been numerous authorities which have been referred to in which, as I conceive, the principle governing such cases as this has been enunciated by Judges of great eminence. There is the statement of the law by Lord *Cairns* in the *Reese River Silver Mining Company* v. *Smith* (1), in which he says: "When I say a 'fraud,' I do not enter into any question with regard to the imputation of what may be called fraud in the more invidious sense against the directors. I think it may be quite possible, as has been alleged, that they were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law, that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must, in a civil point of view, be held as responsible as if they had asserted that which they knew to be untrue." And Lord *Cairns* expresses himself to a similar effect in the case of *Peek* v. *Gurney* (2). It has been said that these passages relate to actions for the rescission of contracts, and not to actions for deceit. But I will first add to this opinion of Lord *Cairns* the statement of the law by Mr. Justice *Maule* in the case of *Evans* v. *Edmonds* (3). He says that where a man makes a statement which he does not know to be true he takes upon himself to warrant his own belief of the truth of that which he so asserts. I agree with what is said in these two opinions, the one of Mr. Justice *Maule* and the other of Lord *Cairns*, and also with what is said by Mr. *Pollock* in his valuable work on torts, that these *dicta*, one of an eminent Common Law Judge, the other of an eminent Chancellor, are now both classical, and that their application extends to actions for deceit as well as to actions for the rescission of contracts. I may add the very clear opinion of the late Master of the Rolls in

(1) Law Rep. 4 H. L. 79. (2) Law Rep. 6 H. L. 377.
(3) 13 C. B 777.

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an action for deceit, namely that of *Smith* v. *Chadwick* (1), in which he lays down the law, as I think, precisely as it has been laid down by Lord Justice *Cotton*: "Now, without repeating at full length what I have said in a recent case, I think the law on this subject is clear. A man may issue a prospectus, or make any other statement to induce another to enter into a contract, believing that his statement is true, and not intending to deceive; but he may through carelessness have made statements which are not true, and which he ought to have known were not true, and if he does so he is liable in an action for deceit; he cannot be allowed to escape merely because he had good intentions, and did not intend to defraud." But reliance has been placed upon some observations by Lord *Bramwell*, expressed in his usual striking manner, and certainly I am very unwilling to enter into a discussion with so great a master of language as Lord *Bramwell*. But I must venture to express my opinion that the expression "legal fraud," which has been in constant use by Judges for very many years, is, to say the least, an exceedingly convenient expression; that is to say, it is an expression which very clearly conveys an idea, which is the object of language, and it appears to me to mean this: that degree of moral culpability in the statement of an untruth to induce another to alter his position, to which the law attaches responsibility. And that is, as I think, where a man makes an untrue statement for the purpose mentioned without reasonable cause for believing it to be true. No doubt the word "fraud" is in common parlance reserved for actions of great turpitude, but the law applies it to lesser breaches of moral duty; and it appears to me the making of any statement upon which others are intended to act without reasonable ground for stating it, and without reasonable ground for believing it to be true, is a breach of moral duty, though it may not be one of such dark complexion as to blast the character of the man for ever who does it. It is not necessary that there should be that amount of wrong in order to give a legal remedy. And I think the same observations apply to Lord Justice *Bowen's* use of the word "dishonesty," though, as Lord Justice *Cotton* has pointed out, when one comes to read the whole of his judgment we see in what sense he uses

(1) 20 Ch. D. 44.

the word "dishonesty," namely, as something implying moral culpability.

Applying these principles to the present case, I confess I cannot bring myself to think that any man reading this section of the Act of Parliament could believe that the prospectus correctly or truly set forth the powers of the company in respect of the right to use steam; in other words, I am unable to see that the directors had any reasonable ground for believing that statement to be true.

But Mr. Justice *Stirling* has considered the case from this point of view, namely, whether they had reasonable ground for believing that which they said. He does not put it upon the point of whether or not they were guilty of this grosser kind of fraud, but he considers the case upon the basis of its being actionable to make a statement without reasonable ground for believing it to be true, and he comes to the conclusion that in this case they had such reasonable ground. And now we must consider upon what he bases his judgment. After making some severe comments upon four of the Defendants for taking the money to qualify them as directors, he says that if it had been said to them, "You have told something in the prospectus which you had no right to tell, you have said that you had a right to use mechanical power when you have not; each and every one of them would have stood aghast." It is very likely that they stood aghast when they heard their conduct with regard to accepting the money so described by Mr. Justice *Stirling*. But that does not affect the justice of his remarks with regard to their conduct; and their liability at law is not to be measured by the surprise that they would feel when it is pointed out to them that they are liable to an action. That would lead to very dangerous consequences, for then persons in the position of the Defendants would be at liberty to deceive others to the extent that they could succeed in deceiving themselves.

But Mr. Justice *Stirling* then proceeds to deal with the facts. His judgment seems to amount to this: that because there was a possibility of the sanction of the Board of Trade being obtained, and the Defendants believed they would obtain that sanction in the future as a matter of course, that was a reasonable ground for

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stating that they had it in the present. I can only say with great regret that I entirely differ from that view. It appears to me that nothing can morally justify a man in stating a thing as a fact, as existing at present, because he expects that it will exist in the future. And when Mr. Justice *Stirling* says that mercantile men dealing with matters of business would be the first to cry out if he extended the notion of deceit into what is honestly done in the belief that these things would come about, I can only say that there are two classes of mercantile men. There are those who have lax notions of the duty of taking care to be accurate, and those who are scrupulously careful to observe this duty; and it is the opinion of the latter class to which I attach most importance.

The next question is whether or not this statement, untrue in fact, and, as I think, made without reasonable ground for believing it to be true by the Defendants, influenced the Plaintiff in taking these shares. Upon this point we do not differ from the opinion expressed by Mr. Justice *Stirling*, for he says what his conclusion upon the evidence is: "I think that the existence of this paragraph had a material influence upon the mind of Sir *Henry Peek* when he applied for the shares." In my judgment, so far as this part of the case is concerned, that carries the case for the Plaintiff. That which materially influences a man in taking a step, subject to the observations already made as to the breach of moral duty on the part of those who make it, gives a cause of action. It is not necessary that it should be the sole influencing motive. If it was a materially influencing motive, then, unless it had been present, the conduct of the Plaintiff might have been different, which is sufficient. But Mr. Justice *Stirling* seems to think that though the existence of the paragraph had a material influence upon the mind of Sir *Henry Peek* when he applied for the shares, that is in a degree modified by the circumstance that Sir *Henry Peek* does not state that had he known the contents of the Act he would not have applied for the shares. I am of opinion that a hypothetical question of that kind is not material in considering this question. No one can tell what he would have done under other circumstances. The ground of complaint is: "I had not the opportunity of exercising my

judgment." And therefore it seems to me that the case is made out that Sir *Henry Peek* was materially influenced, so that for this purpose he was induced to take the shares by reason of this false statement.

Then there remains only the question of damages. Upon that I have nothing to add to what has been said by Lord Justice *Cotton*.

LOPES, L.J.:—

This case is a case of such importance that I desire to state my view of the law, although I in no way dissent from the law as it has been stated, nor from the result arrived at. This is an action of deceit. It is true that there are different degrees of moral delinquency, but I know of no fraud which will support an action of deceit to which some moral delinquency does not belong. An action for deceit will not lie for an innocent misrepresentation, for such misrepresentation is not fraudulent. On the other hand, a slight degree of what I will call moral obliquity will suffice to render a misrepresentation fraudulent in contemplation of law. And let me say this is what I understand by the expression which is so often used in the authorities, and which has been referred to by Sir *James Hannen*, I mean the expression "legal fraud." I will endeavour shortly to state what I believe to be the result of the cases. The law I venture to say is well settled and well understood. I think the result of the cases amounts to this. If a person makes to another a material and definite statement of a fact which is false, intending that person to rely upon it, and he does rely upon it and is thereby damaged, then the person making the statement is liable to make compensation to the person to whom it is made—first, if it is false to the knowledge of the person making it; secondly, if it is untrue in fact and not believed to be true by the person making it; thirdly, if it is untrue in fact and is made recklessly, for instance without any knowledge on the subject, and without taking the trouble to ascertain if it is true or false; fourthly, if it is untrue in fact but believed to be true, but without any reasonable grounds for such belief. I believe that to be a fair statement of what the result of the cases is.

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I will now proceed to deal with this case, and to apply those principles to this case, and I shall endeavour to do that very shortly.

First, with regard to the responsibility of the Defendants. I will deal with that matter first. I think they are all responsible for this prospectus. A distinction has been endeavoured to be made in the case of Mr. *Derry*. I think there is no distinction that can be relied upon. When it is recollected that 100 of these prospectuses were sent to him, and that he issued them, and it must be assumed he read them, I think the fair conclusion is that he adopted that prospectus. Passing from that question, then I think the question arises, which, to my mind, is a most material one, as to what the meaning of the statement in the prospectus is. There are three passages in the prospectus (I think only two have been mentioned hitherto, but I think there are three) which are important. On the first page there are the words "Incorporated by special Act of Parliament, 45 & 46 Vict., authorizing the use of steam or other mechanical motive power." Then there is the passage in the middle of the prospectus, portions of which are in capital letters, and intended to be emphatic, in these words: "One great feature of this undertaking, to which considerable importance should be attached, is that by the special Act of Parliament obtained, the company has the right to use steam or mechanical motive power instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses," and then there is a further passage, which, I think, is not unimportant, lower down in the prospectus, which is in these words: "Looking to the exceptional advantages offered by this undertaking, from the dense population of the towns it traverses, the unusually favourable conditions as to motive power open to the company, and the annual dividends earned by other tramways which do not enjoy such special privileges"—I presume referring to the steam-power—"the directors have reason to believe that the enterprise will prove highly remunerative, and the shares now for subscription offer a very favourable opportunity for a sound and progressive investment." Now those being the words in the prospectus

which are relied upon by the Plaintiff; what is the test we ought to apply in order to ascertain the meaning of those words? I think the proper test is to determine, as far as we can, how a reader of ordinary intelligence reading that prospectus would understand those statements. I come to the conclusion that a reader of ordinary intelligence would understand that in that prospectus was contained a definite assertion of a then existing fact, that is, a right to use steam-power. I cannot think that any reader of ordinary intelligence reading those passages would come to the conclusion that it meant only an assertion of what I call a violent probability—that a consent to use steam-power would be obtained.

If that is the meaning, then the question arises, was it a false statement? It seems to me that that is a matter which cannot be contested and which in point of fact was not contested. It is perfectly clear by reference to the special Act that no steam-power could be used without the consent of the Board of Trade and the two corporations of *Plymouth* and *Devonport*.

Now, passing from that, did the Defendants intend the Plaintiff to act upon that statement? That again, I say, is too clear for argument, and Mr. Justice *Stirling* did not doubt it; I think he could hardly doubt it.

But now I come to one of the two most important matters in this case. Was that statement, having the meaning which I think belongs to it, fraudulent? If the law is correct as I have stated it, it would be fraudulent if it was made recklessly, or if it was made without any knowledge of the subject one way or another, or if it was believed in by those who made it, but without any reasonable grounds for such belief. The Defendants then appear to me to be in this dilemma. If they say they had no knowledge of the subject, whether it was accurate or not, then surely it must be a reckless statement on their part. If, on the other hand, they say, "We believed in it," they must go further, and they must say "We had reasonable grounds for believing it," because if it was believed in, but without reasonable grounds, then it would be fraudulent. Now how could they possibly say they had reasonable grounds for believing that that statement was accurate? They had their own Act of Parliament. If they

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had referred to it they would at once have seen that it was absolutely incorrect. Therefore it appears to me that they must either have been reckless, and this was a statement recklessly made, or if it was a statement believed in, that it was a statement made without any reasonable grounds for believing it. It will not do for them to say, as I rather think Mr. Justice *Stirling*, if I understand his judgment correctly, thought it would do to say, "We had reasonable grounds for saying that we expected that the power would be given us."

Now, with regard to this part of the case, it appears to me that that passage which was read by Sir *James Hannen* from the judgment of Sir *George Jessel*, late Master of the Rolls, in *Smith* v. *Chadwick* (1), is very applicable. It is so short I will venture to read it again. [His Lordship read the passage.] It appears to me that these words cover this portion of the case.

Passing, then, from that, I come to the next question; did the Plaintiff rely on that statement, or, in other words, was he induced to take his shares by means of that statement? Now, the statement need not be the only motive which induced him to take the shares. It would be quite sufficient if that statement materially influenced his mind in taking those shares; and Mr. Justice *Stirling* seems to have come to the conclusion that it did, because he says, "I think the statement materially influenced the Plaintiff's mind." I quite agree with what was said by Sir *James Hannen*, that, so far as this portion of the case is concerned, that concluded it. But that was not the view of Mr. Justice *Stirling*. There is a portion of the judgment in *Smith* v. *Chadwick*, which here, again, becomes valuable. The Master of the Rolls goes on to say: "Again, on the question of the materiality of the statement, if the Court sees on the face of it that it is of such a nature as would induce a person to enter into the contract, or would tend to induce him to do so, or that it would be a part of the inducement, to enter into the contract, the inference is"—the inference, mark—"if he entered into the contract, that he acted on the inducement so held out, and you want no evidence that he did so act; but even then you may shew"—he goes on to say that you may shew other circumstances which rebut that inference. Therefore, assuming the conclusions to which I have

(1) 20 Ch. D. 44.

arrived with regard to the rest of the case, you have here an inference that he did act upon that statement. Mr. Justice *Stirling's* judgment seems to have been influenced by several matters to which he alludes. It is to be recollected that he gives Sir *Henry Peek*, the Plaintiff, every credit for candour and truthfulness. In one part of his judgment he speaks with regard to a defect in his memory; that is with regard to the signature to a certain application for shares. I cannot think that that was very material, and I think an explanation was given of it which is satisfactory. But what we have to look at is, what the result of the whole of the evidence given by him is. He need not have been called at all. The inference, I take it, would have been sufficient if it had been left there. But he is called, and a certain question is put to him by Mr. *Bompas*, which I am rather inclined to think Sir *Henry Peek* somewhat misunderstood, and the answer to which I think Mr. Justice *Stirling* attached too much importance to. When that question was put to Sir *Henry Peek* his mind was directed to that portion of it which related to the seven years, and, as I observed in the course of the argument, if the question had been put in a different form, namely, in this form, "If there had appeared on that statement an assertion that this right to use steam motive power was subject to the consent of the Board of Trade?" I do not hesitate to say, having regard to the rest of his evidence, and the general result of his evidence, that I believe he would unreservedly have said, "I should not, in those circumstances, have taken the shares."

There is another matter which I will only shortly allude to, and that is this. Mr. Justice *Stirling's* mind seems to have been affected by what took place at the meeting in November, 1884, when Sir *Henry Peek* said he had confidence in the directors, or used some words to that effect, but then, as Mr. *Bompas* has reminded us, it must be borne in mind that at that time there was a prospect still existing of getting this consent from the board. I think the explanation of what Sir *Henry Peek* said at that meeting is this: "Well, I do not desire, by anything I may say, in any way to embarrass or hamper the directors. It is possible they may get this consent in the future, and I will do nothing which shall in any way prejudice their so doing."

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I think that disposes of all the matters in the case except the question of damages. I quite agree with what has been said in respect to damages. It must be the difference between the sum paid for the shares and their value either at the time when the writ was issued or their value at the present time.

It was then arranged that the case should be further argued upon the question of the measure of damages.

1887. Nov. 21. *Bompas*, Q.C., and *E. W. Byrne*, for the Appellant:—

The principle on which the inquiry as to the amount of damages is to be based has not been argued, or decided by the Court, and it is submitted that the measure of such damages must be the loss sustained by the Appellant, and that such loss is represented by the difference between what he paid and the actual value of the interest which he obtained. In this case no dividends were ever paid; the real value of the shares at the time they were allotted to him can only be ascertained by the light of subsequent events, and such value is in fact the amount which the holder of the shares will get back from the liquidator: *Davidson* v. *Tulloch* (1).

[LOPES, L.J., referred to *Brown* v. *Muller* (2).]

Twycross v. *Grant* (3); *Arkwright* v. *Newbold* (4). So that the amount paid by the Appellant with interest from the date of payment must be ascertained, and from that must be deducted the amount which the liquidator will return, and the difference will shew the amount of the damages.

Hastings, Q.C., and *Buckley*, Q.C., for the Respondents:—

The true measure is the difference between the amount the Appellant paid and the value of the shares at the time when he became aware of the true state of the case, and discovered the alleged fraud; for he could have rescinded the contract or disposed of the shares, and instead of doing so he chose to continue

(1) 3 Macq. 783, 790.
(2) Law Rep. 7 Ex. 319.
(3) 2 C. P. D. 469.
(4) 17 Ch. D. 301.

to hold them, and accordingly is not entitled to take into account subsequent events.

[They referred to *Waddell* v. *Blockey* (1).]

[LOPES, L.J., referred to *Hamer* v. *James* (2).]

Bompas, in reply.

COTTON, L.J.:—

One rather difficult point was omitted in the argument, because neither party knew what would be the result of our opinion on the question whether the Defendants had made any misrepresentation which entitled the Plaintiff to relief; and we have had a long and exhaustive argument to-day on the question. It is one of considerable difficulty. The question which arose was this: There being no evidence which would really fix the loss, we thought there ought to be an inquiry; but the question was, to what period ought that inquiry to refer? and it was suggested that the inquiry should be as to the value of the shares at the time when the action was brought or else at the present time. But I think, after the discussion we have had, that on principle, and in accordance with the cases, neither of those periods can be fixed. The damage to be recovered by the Plaintiff is the loss which he sustained by acting on the representations of the Defendants. That action was taking the shares. Before he was induced to buy the shares, he had the £4000 in his pocket. The day when the shares were allotted to him, which was the consequence of his action, he paid over that £4000, and he got the shares; and the loss sustained by him in consequence of his acting on the representations of the Defendants was having the shares, instead of having in his pocket the £4000. The loss, therefore, must be the difference between his £4000 and the then value of the shares.

Now, it must not be taken that the value of the shares must be what they would have sold for in the market, because that might not shew the real value at all. I do not know whether there was any market in this case, but the market might have

(1) 10 Ch. D. 416. (2) Unreported.

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been affected by the representations which were made by the Defendants, which induced the Plaintiff to act, and which might have induced others to act. Neither can the Plaintiff get the benefit of any loss or depreciation in the shares which was occasioned by subsequent acts. If the company at the time was a good company and the shares had an intrinsic value, then no fact which subsequently occurred, as for instance, some Act of Parliament being passed to prevent such tramways from using steam-power, or anything else, ought to add to the damages to be paid by the Defendants. And of course a plaintiff cannot aggravate the damages he is to get by acting unreasonably, and if here the Plaintiff had in any way acted unreasonably, then any loss which was the consequence of that would not be added to the damages which were to be paid by the Defendants. But I do not think that he acted unreasonably. The only time when it could be said he acted unreasonably was when he discovered the fraud. The point which occurred to me was whether he ought not then to have at once repudiated the shares and to have brought an action against the company to compel them to take back the shares and to get back his £4000; but I cannot think that he can be considered as having acted unreasonably in that matter. He did commence an action in order to set aside the purchase from the company, but that was prevented from being effectual because the winding-up petition was presented a few days before. Nor do I think he ought to be precluded from taking into account the subsequent events. Although the value of the shares is not to be ascertained at the subsequent period so as to take into account for the benefit of the Plaintiff events subsequent which depreciated their value, yet those events, if they shew that the company was originally, with the capital which it had got, a company which was worthless, may, in my opinion, be taken into account as evidence of what was the value of the shares immediately after they were allotted to the Plaintiff. So that it may be that, useful as this discussion has been in order to elucidate what ought to be the proper time for ascertaining the value it may ultimately produce no good result to the Defendants. But I think it is in accordance with the cases, and in accordance with principle, that the real value, and not the market

value, is to be ascertained immediately after the day when the shares were allotted to the Plaintiff. That is the rule laid down by Lord *Campbell* in *Davidson* v. *Tulloch* (1). That was a case of an action for deceit, by which the plaintiff or those who represented him (for I think the action was brought by the plaintiffs' executors) was induced to take shares by misrepresentation. Lord *Campbell* says: "The proper mode of measuring the damages is to ascertain the difference between the purchase-money and what would have been a fair price to be paid for the shares in the circumstances of the company at the time of the purchase; and that may be made the measure of damages if a trial shall take place." There was a future trial to be held, because I think nothing was really decided there, except laying down what the principle was. That is in accordance with what was laid down by Lord Justice *Fry* in *Arkwright* v. *Newbold* (2), and, I think, is in accordance really with *Twycross* v. *Grant* (3), because there the judgments of all the Judges proceeded on the footing that at the time that the shares were bought, the company was utterly worthless. What was said by Lord *Bramwell* is very important, because he says that it cannot be unreasonable on the part of a purchaser not to sell. Of course if he sells and does not sell unreasonably, whatever he gets he must bring into account; but he does lay down in various ways that it is not unreasonable for a purchaser not to sell so as to deprive him from getting as damages the difference between the price that he paid and what was, in fact, the actual value of the shares at the time when he was induced to purchase.

In my opinion, therefore, although events injurious to the company, which occurred not from intrinsic defects in it, but from events which happened after the purchase, cannot be taken into account, if there is no better evidence, the result of the winding-up of the company and the amount which will be returned to the shareholders may be taken into account. In my opinion, the way of fixing the loss is to take the real value of the shares the day after they were allotted to the Plaintiff.

(1) 3 Macq. 790. (2) 17 Ch. D. 301.
(3) 2 C. P. D. 469.

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SIR JAMES HANNEN :—

I will add only a few words; indeed, perhaps, I ought to content myself with simply saying I agree. I will endeavour to put it in my own words, though I believe I do not differ in the slightest degree from what Lord Justice *Cotton* has said. The question is, how much worse off is the Plaintiff than if he had not bought the shares? If he had not bought the shares he would have had his £4000 in his pocket. To ascertain his loss we must deduct from that amount the real value of the thing he got. That must be ascertained by the light of the events which have happened down to the time of the inquiry—not what the shares might have been sold for, because he was not bound to sell them, and subsequent events may shew that what the shares might have been sold for was not their true value, but a mistaken estimate of their value.

LOPES, L.J. :—

The question in this case is what is the loss which the Plaintiff has sustained by acting on the mere representation of the Defendants, and what is the true measure of his damage? In my opinion, it is the difference between the £4000 he paid and the real value of the shares after they were allotted. Any damage occurring after the discovery of the fraud, when the Plaintiff might have rescinded the contract, and which would not be attributable to his acting on the misrepresentation, but to other causes, in my opinion would not be recoverable.

Solicitors for Plaintiff: *Tamplin, Tayler & Joseph.*

Solicitors for Defendants: *Surr, Gribble & Co.*, agents for *J. W. Wilson, Plymouth; Linklaters & Co.; Quick & Co.; Haines & Clutton.*

M. W.

In re RYDER (A PERSON OF UNSOUND MIND).

C. A. 1887 Dec. 5.

Lunacy—Death of one of two joint Committees—Fund to Credit of Lunacy Matter and Lands Clauses Matter—Payment of Dividends to new Committee —Petition—Costs.

At the time of the death of one of the two joint committees of a lunatic, under an order made in 1885 in the matter of this lunacy and in the matter of the *Lands Clauses Consolidation Act*, 1845, the dividends on a sum of consols to the credit of those two matters, representing purchase-moneys of lands belonging to the lunatic and taken by the Metropolitan Board of Works, were payable to the two joint committees. The joint grant being vacated by the death, the survivor of the joint committees applied to be appointed sole committee, and asked that the order of 1885 might be varied and the dividends be ordered to be paid to him alone. The Master appointed him sole committee, but declined to make any order as to the dividends. The sole committee then presented a petition entitled in the matter of the lunacy and also in the matter of the *Lands Clauses Consolidation Act* and Board of Works, praying that the dividends both past and future might be paid to him, and served the Board of Works. At the hearing the Board contended that they were not liable for the cost of successive orders for the payment of dividends unless there had been a change in the beneficial interest.

The Court ordered the past and future dividends to be carried to the credit of the matter of the lunacy, and when so carried to be paid to the Petitioner, intimated that any future order appointing a new committee might direct payment to him of the dividends, and that as such dividends would be standing to the credit of the lunacy, the Board need not be served on the application, and ordered the Board to pay the costs of the present petition.

THIS was a petition by *R. C. W. Ryder*, the committee of the lunatic in this matter.

There were originally two committees—*R. C. W. Ryder* and *Thomas D. Ryder*. Under an order made in 1885 in the matter of the lunacy and in the matter of the *Lands Clauses Consolidation Act*, 1845, it was ordered that a portion of a sum of consols standing to the credit of the two matters, and representing the purchase-moneys of lands belonging to the lunatic and taken by the Metropolitan Board of Works, under the powers of the *Lands Clauses Consolidation Act*, should be sold and applied in a particular manner, and that the dividends on the residue of the fund should be paid to the two joint committees. Under this order the

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dividends on the residue (which amounted to £1841 6*s.* 4*d.*) were thus paid down to those of the 5th of July, 1885. On the 23rd of January, 1886, *Thomas D. Ryder*, one of the joint committees, died, and as a grant to joint committees is, according to the practice in Lunacy, vacated by the death or discharge of either of them, and there is no survivorship of the office, it became necessary to obtain a fresh grant. The survivor, *R. C. W. Ryder*, was appointed sole committee on the 9th of August, 1886. It was part of the application for his appointment that the order made in 1885 for payment of the dividends to the two joint committees might be varied, and that the past and future dividends might be ordered to be paid to the sole committee, but the master declined to deal with that part of the application, and considered that the proper mode of applying for such an order would be by petition entitled in the matter of the lunacy and also in the matter of the *Lands Clauses Consolidation Act* and Board of Works, with which the Board should be served. This petition was accordingly presented so entitled and praying that an order might be made for payment of the past dividends (none of which had been received since July, 1885) and also of the future dividends to the sole committee; and was served upon the Board of Works.

Cecil Russell, in support of the petition.

Geare, for the Metropolitan Board of Works:—

The Board cannot be called upon to pay the costs of this petition. They are only liable for the cost of successive orders for the payment of dividends in cases where there have been changes of the beneficial interest, such as by the death of a tenant for life: *Re Andenshaw School* (1); *In re Jolliffe's Estate* (2); *Ex parte Hordern* (3).

Russell, in reply.

COTTON, L.J.:—

The proper order will be to direct that the past and future dividends be carried to the credit of the matter of the lunacy,

(1) 1 N. R. 255. (2) Law Rep. 9 Eq. 668.
(3) 2 De G. & Sm. 263.

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and when so carried be paid to the Petitioner, the committee. In case it should be necessary at some future time to appoint a new committee, it will be proper that the order appointing him should go on to direct payment of the dividends thenceforth to him, and inasmuch as the dividends affected by such order will (under the order now made) be moneys standing to the credit of the lunacy, it will not be necessary to serve the Metropolitan Board of Works upon the application for the order.

I do not think that the Petitioner ought to be saddled with any costs, and the costs of the petition will be paid by the Board.

LINDLEY and LOPES, L.JJ., concurred.

Solicitors: *Davidson, Burch, & Co.*; *R. Ward.*

W. W. K.

LUCAS *v.* MARTIN.

C. A. 1887 NORTH, J. *July* 20. C. A. 1888 *Jan.* 26.

[1886 L. 778.]

Bankruptcy—Scheme of Arrangement—Annulment of Bankruptcy—Approval by the Court—Bankruptcy Act, 1883, *s.* 18, *sub-s.* 2; *s.* 23, *sub-ss.* 1, 2.

The trustee in a bankruptcy entered into a written agreement with the Defendants whereby it was agreed that the Defendants should purchase the assets of the bankrupt for such a sum as would pay the expenses of the bankruptcy and the preferential debts in full within fourteen days after the approval of the scheme by the Court, and a certain composition to the unsecured creditors, and that on the approval of the scheme by the Court the bankruptcy should be annulled. The creditors by a requisite majority passed a resolution agreeing to the scheme of arrangement as proposed, but adding a clause that a bond should be given by the Defendants for payment of the money. The Court afterwards approved the agreement signed by the Defendants, and annulled the bankruptcy:—

Held, in an action by the trustee against the Defendants for specific performance of their agreement, that the creditors not having accepted the scheme proposed in the form in which the Defendants had agreed to it, there had been no approval of the scheme by the Court, and the agreement could not be enforced against the Defendants.

THIS was an action to enforce specific performance of an agreement between the Plaintiff *C. Lucas*, who was the trustee in the bankruptcy of *Frederick Curtois*, and the Defendants.

Frederick Curtois was adjudicated bankrupt on his own petition

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on the 28th of March, 1885. It was subsequently proposed that a scheme of arrangement should be agreed on, and the bankruptcy annulled; and on the 2nd of April, 1885, an agreement in writing was signed by the Plaintiff and the Defendants *John Martin* and *George Martin*, who were brothers-in-law of the bankrupt, by which the Defendants agreed to purchase all the real and personal estate vested in the Plaintiff as the trustee in the bankruptcy of *F. Curtois* upon the following terms: — The Defendants were to pay to the Plaintiff such sum of money as should be sufficient to pay:

(1.) All costs and expenses, including the trustee's remuneration, and all preferential debts, to be paid in full within fourteen days after the date of the approval of the Court.

(2.) A dividend of 10*s.* in the pound to unsecured creditors within fourteen days of such approval.

(3.) A dividend of 5*s.* in the pound to unsecured creditors on the 6th of July, 1885.

It was also provided that upon approval of the scheme by the Court the bankruptcy should be annulled by the Court, and that the Plaintiff should continue the realization of the assets of the said *F. Curtois* pending the confirmation of the said scheme by the Court.

At a meeting of the creditors on the 25th of April, 1885, which was summoned to consider the offer made by the Defendants, the following resolution was passed:—

1. That the offer made by *J. Martin* and *G. Martin* to purchase the whole of the real and personal estate of the bankrupt for such sum of money as should be sufficient to pay—all costs and expenses, including the remuneration of the trustee, and all preferential debts, which were to be paid in full within fourteen days after the approval of the scheme by the Court; a dividend or composition of 10*s.* in the pound to the unsecured creditors within fourteen days after such approval as aforesaid; a further dividend or composition of 5*s.* in the pound to the unsecured creditors on the 6th of July, 1885; be, and the same is, hereby accepted, and that *C. Lucas* be appointed to receive the purchase-money from the said *J. Martin* and *G. Martin* at the time named, and to distribute the same among the creditors.

2. That the said *J. Martin* and *G. Martin* shall enter into a bond with the said *C. Lucas* for securing the payment of the purchase-money as aforesaid.

3. That upon approval of this scheme by the Court the receiving order made herein be rescinded and the order of adjudication made against the said *F. Curtois* be annulled.

This resolution was passed and signed by the statutory majority of creditors, under sect. 23, sub-s. 1 of the *Bankruptcy Act*, 1883.

On the 14th of May, 1885, another general meeting of the creditors was held, at which the above-mentioned resolution was confirmed by the statutory majority of the creditors.

On the 1st of June, 1885, the official receiver made his report, stating, among other things, the facts before mentioned, and annexing to his report copies of the agreement and of the resolution passed at the two meetings of creditors.

On the 11th of June, 1885, an order was made under sect. 23, sub-s. 2 of the *Bankruptcy Act*, 1883, by the Judge of the County Court of *Lincolnshire* in the bankruptcy of *F. Curtois*, on the application of the official receiver, that the Court being satisfied that the creditors had duly accepted and approved a composition or scheme of arrangement on the following terms: namely, that *J. Martin*, of, &c., and *G. Martin*, of, &c., should under an agreement, dated the 2nd of April, 1885, and made, &c., purchase all the real and personal estate of the said *F. Curtois*, his trustee, for the sum of money and upon the terms and conditions mentioned in such agreement (a copy of which agreement was annexed thereto), and that the purchase-money should be applied by the said trustee in payment of the costs, expenses, and prior claims mentioned in the agreement and of the composition therein mentioned, and that the adjudication should be annulled upon approval of the scheme; it was ordered that the said composition or scheme of arrangement was thereby sanctioned; and the order of adjudication was annulled, and the receiving order was rescinded.

Disputes having arisen between the trustee and the Defendants *J. Martin* and *G. Martin* as to the construction of the agreement, and the amount payable in respect of the debts of the unsecured creditors, the trustee, by the direction of the Court of Bankruptcy,

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brought the present action against them claiming specific performance of the agreement of the 2nd of April, 1885, and the payment of certain sums of money specified in the statement of claim. The only point in the Defendants' defence which requires a report was that the agreement of the 2nd of April, 1885, had not been duly accepted by the creditors nor approved by the Court, a new term having been introduced at the creditors' meeting to which the Defendants had never agreed, namely, that they should give a bond for securing payment of the purchase-money.

The action was heard before Mr. Justice *North* on the 20th of July, 1887.

Napier Higgins, Q.C., and *Rashleigh*, for the Plaintiff.

Cozens-Hardy, Q.C., and *R. J. Parker*, for the Defendants.

NORTH, J.:—

I think the matter is reasonably clear, and in coming to the conclusion I do, I disclaim altogether any examination into the order of the Court of Bankruptcy, or any consideration of the question whether it had power or not to make the order it did. I assume that it had, and I proceed upon the footing that it had.

Now an agreement was made on the 2nd of April, 1885, between *Lucas*, the trustee appointed under the bankruptcy of *Curtois* of the one part, and the Defendant of the other part, *Curtois*' trustee thereby agrees to sell and the *Martins* to purchase the estate vested in *Lucas* upon the terms and conditions hereinafter mentioned, that is to say that the *Martins* should pay to *Lucas* such a sum of money as should be sufficient to pay first of all certain costs and expenses which are defined in the agreement, secondly, to provide a dividend of 10*s.* in the pound, these payments to be made within fourteen days after the date of the approval by the Court of the scheme of arrangement; and, thirdly, a dividend of 5*s.* in the pound on the 6th of July, 1885. Then upon the approval of this scheme by the Court the bankruptcy to be annulled by order of the Court upon payment by the *Martins* of the stipulated sums, and *Lucas* to execute the assurances

necessary for vesting the estate contracted to be sold by *Lucas* in the *Martins* or as they may direct, with a proviso that *Lucas* shall continue to receive the assets pending the confirmation of the scheme by the Court. That is the bargain between these two parties, but it is all to be read subject to the sanction of the Court, and for the best of all reasons. Of course the trustee does not choose to bind himself to an agreement of this sort unless he gets the approval of the Court to what is being done. In order to get the approval of the Court it was necessary to get the approval of the creditors, and a meeting was held on the 25th of April, when they considered the matter, and they then come to this resolution. It is a resolution by the statutory majority of the creditors, and they resolve as follows: First, that the offer made by the *Martins* to purchase the whole estate for such a sum as shall be sufficient to pay the various sums mentioned in the agreement be and the same is hereby accepted, and that *Lucas* be appointed to receive the purchase-money and to distribute the same among the creditors.

Now one of these payments was to be made at the end practically of three months from the date of the agreement. Then the second head is (this is what the creditors resolve upon in pursuance of the Act) that *J. Martin* and *G. Martin* shall enter into a bond with *Lucas* for securing the due payment of the money required as aforesaid; and that upon the approval of this scheme by the Court the receiving order made by the Court be rescinded, and the order of adjudication annulled. That is signed by what I have no doubt is the proper majority of the creditors.

That resolution is then brought before the Court of Bankruptcy under the 23rd section of the last Act, which provides that "where a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by special resolution, resolve to entertain a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs;"—that is to say there may be either of two courses adopted: there may be a composition accepted in satisfaction of the debts, or a scheme of arrangement may be made of the bankrupt's affairs so as to wind them up in some other way in order to get what can be got

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for the creditors out of the estate, "and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication." It is unnecessary for me to go into the requirements of the Act on that subject, because I take it for granted that all the formalities required under the Act have in this case been duly observed. Then the 2nd sub-section provides that: "If the Court approves the composition or scheme it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the Court may appoint, on such terms, and subject to such conditions, if any, as the Court may declare"—that is to say, the scheme which the creditors have resolved to entertain, but nothing else. But the Court would have no power to deal with the matter except by proceeding upon that resolution, and adopting the proposal or scheme, whichever it may be, that the creditors have approved of. Then the 3rd sub-section is: "If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court that the composition or scheme cannot proceed without injustice or undue delay, or that the approval of the Court was obtained by fraud, the Court may, if it thinks fit, on application by any person interested, adjudge the debtor bankrupt, and annul the composition or scheme, but without prejudice to the validity of any sale, disposition, or payment duly made, or thing duly done, under or in pursuance of the composition or scheme. Where a debtor is adjudged bankrupt under this sub-section, all debts, provable in other respects, which have been contracted before the date of such adjudication shall be provable in the bankruptcy." Then it provides that the Court may adjudge the debtor bankrupt and annul the composition and so on. It is unnecessary to pursue that further.

Now what is the composition or scheme referred to in that sub-section? It is the same composition or scheme which is referred to in the 2nd sub-section, which is the composition or scheme to be approved by the creditors as mentioned in the 1st sub-section.

Well, then, the Court makes its order on the 11th of June, and it is made on the application of the official receiver. His report

is read and some solicitor is heard for him. The trustee of the estate appears and counsel for certain creditors, and then "the Court being satisfied that the creditors in the above matter have duly accepted or approved of the composition or scheme of arrangement in the following terms, namely," and then it sets them out. Then it proceeds "and that the adjudication shall be annulled on the approval of the scheme, and that the said composition or scheme of arrangement be hereby sanctioned," and in pursuance of that it is ordered that the adjudication be annulled and the receiving order rescinded.

The order does not refer to the bond, but it refers to what has been done by the creditors, and I have before me the certified copy of the resolution of the creditors which was come to on that occasion, and that resolution of the creditors does provide that the Defendants shall enter into the bond, and it is that resolution which is the foundation of the ulterior proceedings of the Court. That being so I accept entirely that order as an effectual and proper order made in the bankruptcy.

But the question is now raised whether in this Court the Plaintiff can sue the Defendants to compel them to carry out their agreement. The agreement approved of by the Court is the agreement which has been approved of by the creditors; and this agreement contains a term which was not approved of by the Defendants. The Defendants have, therefore, agreed to terms which have not been accepted by the creditors or by the Court, whose acceptance is essential. They have only accepted upon the introduction of a new term. If there was anything to shew that the Defendants had assented to that new term, it would be a different matter. If they had assented to that new term it seems to me they would be bound by that agreement *plus* that term, but there is no evidence that they had assented to it at all. They have not assented to the annulling of the bankruptcy in any way excepting upon and in execution of their agreement, and long before that date, the 11th of June, they stated that a difficulty had arisen, and that they declined to be bound by that agreement. Whether they could have declined if the agreement had been assented to by the Court within a reasonable time in the terms expressed without any addition is another matter. It

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seems to me, therefore, that the agreement by which they were bound has only been assented to by the Court with the addition of a new term to which the Defendants have given no assent at all. The only other thing is, that the bankruptcy has been annulled, but that has not been done by the action of the Defendants in any way, and the assets have not been delivered over to them.

Under those circumstances it seems to me that the agreement into which they entered has not been approved of in the form in which it was entered into by them, and that the Plaintiff cannot enforce it.

D. P.

From this judgment the Plaintiff appealed. The appeal was heard on the 26th of January, 1888.

Napier Higgins, Q.C., and *Rashleigh*, for the Appellant:—

The Defendants cannot go behind the order of the Court made on the 11th of June, 1885, whereby the scheme of arrangement was approved and the bankruptcy annulled. So long as that order stands no one is at liberty to say that the Court has not approved the scheme, and the only condition which was made in the agreement with the Defendants, was that it should be so approved by the Court. Therefore they cannot resist performance of this agreement. It is true that the clause as to the bond was no part of their agreement, but it was no part of the scheme, and the Court made no mention of it in the order; nor do we now call upon the Defendants to perform it. It was added to the resolution by the creditors, not as part of the agreement or scheme, but as directory only. If it was part of the scheme, the Court had power under sect. 23, sub-sect. 2, to leave out any term of the scheme which it pleased.

The approval of the Court was not really necessary for the validity of the agreement, for the trustee had power to sell the assets for a fair price, without the consent either of the creditors or the Court. On that ground alone we are entitled to specific performance.

Cozens-Hardy, Q.C., and *R. J. Parker*, for the Defendants, were not called on.

LORD HALSBURY, L.C.:—

I think that the judgment of Mr. Justice *North* must be affirmed. The agreement which it is sought to enforce against those two gentlemen was an agreement which I think, in every part of it, was subject to the approval of the Court. The approval of the Court becomes essential for the making of the agreement *talis qualis*. It is idle to tell us that some parts of the agreement might have been made, or that a different agreement might have been made, without the approval of the Court. There are essential parts of it, running through the whole of the agreement, which require the confirmation of the Court. The Defendants make their proposition subject to the agreement of the Court; and unless there is the approval of the Court they have not made any offer which can be enforced; because, as I say, they have imported into their offer the approval of the Court as an essential part of it.

Then did the Court approve it? Apart from the question of estoppel by the judgment, with which I will deal presently, the fact appears now to be beyond dispute that what the creditors did in fact agree to was a bargain that besides and in addition to that which these two gentlemen had agreed to do as the consideration which they were to give, they were also to enter into a bond. That was the composition, or agreement, or arrangement which the creditors agreed to, and they have never agreed to anything else. The Court has approved, and could only approve, by virtue of the statute, that which the creditors had agreed to. The provision in sub-sect. 2 of sect. 23 appears to me to have reference to a totally different matter. That assumes a good agreement agreed to by the creditors, and the Court is then invested with the jurisdiction to impose terms and conditions as to the circumstances under which, and even the persons to whom, in pursuance of that agreement, the assets of the former bankrupt shall be conveyed. And it appears to me under these circumstances that if we have liberty to enter into the question of what the real facts are, there is no agreement by these gentlemen to do the thing which the creditors approved of and which the Court has approved of. Therefore it is impossible to enforce specific performance of an agreement into which,

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according to my view, the Defendants have never entered, because they have never entered into this particular bargain, except under circumstances which shew that their obligation to perform that agreement does not arise.

It is said that we cannot arrive at what the real facts are—that we must be estopped by the order of the Court. It appears to me that that is a very strange contention. The order of the Court purports to confirm that which the creditors in fact did. The recital in the order inaccurately states that that which the creditors agreed to was the agreement *simpliciter*, and not the agreement *plus* the additional term. I entirely dissent from the view that we are not entitled to see what the facts are, and I am not certain that I am altogether able to understand the principle upon which it is alleged that, as against a stranger, not a party to the bankruptcy, this order of the Court is conclusive and binding upon him, so that we cannot ascertain what the real facts are. Here this may be a judgment *in rem*. It may well be that that binds all the world as an adjudication, and that you cannot go behind the adjudication, but to suggest that a recital of a certain fact leading up to the adjudication is binding upon all the world, so that you cannot prove that the allegation of that recital is different from the truth, is to my mind a novelty to which I for one will give no countenance. Under these circumstances I think the judgment of the learned Judge of the Court below was right, and that this appeal should be dismissed.

COTTON, L.J.:—

I am of the same opinion. The first question which has been raised is this, that the agreement was not conditional on the approval of the Court. The agreement is not a very good piece of conveyancing language, but I think it appears from it, that although it is not in express terms stated that the agreement shall be conditional, when you look at it, it must be so; because it was an agreement which could not be carried out without the approval of the Court, the approval of the Court being necessary in order to obtain that which was the object of the proposed purchasers, namely, the annulment of the bankruptcy. The time for payment of the money has reference to the approval

of the Court, and the whole agreement, though not said in terms to be conditional on the approval of the Court, is in substance, when one reads the agreement and sees what the object was, necessarily subject to the approval of the Court.

Then was the approval of the Court given to this agreement, that is to say, to the terms contained in it? There, again, the order is not artificial in its terms, but it commences in this way:—"And the Court being satisfied that the creditors in the above matter have duly accepted and approved the composition or scheme of arrangement in the following terms, &c." Then it mentions some of the terms of that agreement, and refers to the agreement as an exhibit. What was the meaning of that? In fact we know that the agreement in its terms, as signed by the purchasers from the Plaintiff, was not assented to by the creditors, because, although it is so expressed in the form of the resolution, it was in reality one term of the agreement assented to by the creditors that there should not be simply a payment of money by the Defendants, but that before the money was paid the proposed purchasers should give a bond for the performance of the obligation which they had undertaken by their agreement. That was never assented to so as to become any part of an agreement entered into by the purchasers.

But it is said that although there is that reference to what had been approved of by the meeting of creditors, yet, having regard to the report of the official receiver, the Court did not consider that there had been an introduction of that term as to the bond, because it is not mentioned in the report; but, as I understand, the report contains annexed to it the resolution of the creditors, from which it does appear that this term was introduced by the creditors in their approval, and although, as I say, it is not very clear and artificial, yet we must look and see what was in fact approved by the creditors, in order that we may know what was approved by the Court. The power of the Court is limited to approving of that which is agreed to by two meetings of the creditors; and therefore, in my opinion, the proper construction has been put upon this order by the learned Judge in the Court below, that although it contains this reference to what was signed by the parties, it really only approves of

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that which had in fact become binding by the assent and approval of the creditors in general meeting. It was said, however, that we ought not to read the order in that way, for this reason, that there is a power given to the Court to annul the bankruptcy and to vest the property in the purchasers on such terms as it thinks fit, and here the bankruptcy was annulled without reference to this term. It is said that therefore we ought to consider that the Court when it approved of the arrangement, or scheme, or composition in these terms intended to dispense with that clause which had been introduced by the creditors. Now, in my opinion, the Court has no such power, because although it might give directions where a scheme did not make any provision for the terms upon which the property is to be vested in the purchasers, yet where there is an express agreement by the creditors by their resolution that a certain term shall be imposed, in my opinion the Court has no jurisdiction to depart from that, and to say although we approve that which has been done by the creditors, we strike out that which we must consider as important, as in fact it was imposed by their resolution. As a mere matter of construction in my opinion it would be wrong so to construe this order, unless there were an express provision in it that that portion of the agreement should be dispensed with. I think the Court had no power to make any such order, but the fact that it does not in terms purport so to do in my opinion is strong against such a construction. In my opinion the appeal fails.

BOWEN, L.J. :—

I am of the same opinion. I have nothing to add.

Solicitors: *Greenfield & Cracknall,* agents for *V. Stapleton, Stamford; Taylor, Hoare, Taylor, & Box,* agents for *Thimbleby & Sons, Spilsby.*

M. W.

In re POUNTAIN.

C. A.
1888
Feb. 6, 7.

Supposed Lunatic—Pending Application for Inquisition—Interim Receiver appointed ex parte.

In a proper case the Court will, pending an application for an inquisition, appoint an interim receiver of the estate of the supposed lunatic, and if the case is urgent will do so upon an *ex parte* application.

THIS was an application, made *ex parte*, for the appointment of a receiver of the estate of *J. T. Pountain*, a supposed lunatic.

The Applicants, who were first cousins of *J. T. Pountain*, had, on the 4th of February, 1888, presented a petition for an inquiry as to his lunacy. This petition had not been served upon *J. T. Pountain*, and the proceedings under it were still pending.

From the evidence in support of the petition it appeared that *J. T. Pountain*, who was entitled to large landed estates, on which rents to a considerable amount were accruing, had, some four weeks since, become unfit to manage himself and his affairs, and was labouring under the delusion that he had recently come into a quantity of money, and was possessed of a large balance at his bankers. In point of fact, however, *J. T. Pountain* had no balance whatever at his bankers, for his account with them was considerably overdrawn. But notwithstanding this, he continued to draw cheques without having any assets in the hands of his bankers to meet them; and several actions had been brought and were pending against him, amongst which was an action by his bankers. Moreover, in an action brought against him in a county court the plaintiffs had obtained a judgment, on which they would in two or three days be entitled to levy execution. There was also a considerable arrear of interest due from him on mortgage debts, and his mortgagees were threatening to take possession.

It was proposed that one Mr. *F. L. Sowter* should be the receiver.

Swinfen Eady, in support of the application:—

The Court will in a proper case appoint a receiver of the estate of a supposed lunatic pending an inquisition: *Re Ridley*, unre-

C. A. 1888 *In re* POUNTAIN.

ported, but referred to in *Elmer* on Lunacy (1), where the form of the order is given.

It is true that in that case the petition had been served on the supposed lunatic, but this is a case of extreme urgency, and there has been no time to serve *J. T. Pountain* with the petition.

COTTON, L.J.:—

I think the Applicants have made out a *primâ facie* case. We will appoint Mr. *Sowter* interim receiver. His appointment will take effect immediately, but he must not receive any part of the property until he has given security. His proper course will be to apply to be appointed guardian *ad litem* in the several actions pending against Mr. *J. T. Pountain*.

LINDLEY and BOWEN, L.JJ., concurred.

Solicitors: *Aldridge, Thorn, & Morris*, agents for *Smith & Leech, Derby*.

W. W. K.

C. A. 1888 KEKEWICH, J. *Jan.* 11. C. A. *Feb.* 1, 8, 9.

In re MERSEY RAILWAY COMPANY.

Railway Company—Judgment Creditor—Receiver and Manager—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *s.* 4 [*Revised Ed. Statutes, vol. xv., p.* 598].

A judgment creditor of a railway company obtained an order for a receiver and manager under sect. 4 of the *Railway Companies Act*, 1867. After this, another judgment creditor applied for a similar order, which was made by *Kekewich*, J., without prejudice to the former order:—

Held, on appeal, that a judgment creditor gains no priority by obtaining a receivership order, that when a receivership order has been made and is in force another judgment creditor gains no benefit whatever by obtaining a similar order, and that such subsequent order ought not to be made. The second order was therefore discharged.

THE *Mersey Railway Company* was incorporated by the *Mersey Railway Act*, 1866. On the 14th of December, 1887, *John Waddell & Sons*, their contractors, recovered judgment against them for £5033 19*s.* 2*d.* and costs, due for work and materials.

On the 23rd of December, 1887, Mr. Justice *Stirling*, on the

(1) 6th Ed., pp. 11, 15, 176.

petition of *John Waddell & Sons*, made an order under the *Railway Companies Act*, 1867 (1), appointing the Right Hon. *E. P. Bouverie* (who was the chairman of the company), and *S. L. Mason*, managers and receivers, to manage the undertaking of the company and receive the tolls and sums of money arising out of the undertaking. It was ordered that they should out of the tolls and sums of money received pay all expenses proper and necessary for the maintenance and management and working of the railway, and all proper outgoings in respect of the undertaking, and pass their account at the times to be fixed by the Chief Clerk's certificate, and pay into Court the balances from time to time certified to be due from them. Inquiries were directed: (1) what was due to the Petitioners for principal, interest and costs upon their judgment debt; (2) whether there were any other and what debts of the company, and whether the same or any and which of them were incumbrances or charges on the undertaking, or the tolls and money arising out of the same, or any and what part of the same respectively, and how the same respectively were created, and what were the rights and priorities of the persons for the time being interested therein.

(1) 30 & 31 Vict. c. 127, s. 4: "The engines, tenders, carriages, trucks, machinery, tools, fittings, materials, and effects, constituting the rolling stock and plant used or provided by a company for the purposes of the traffic on their railway, or of their stations or workshops, shall not, after their railway or any part thereof is open for public traffic, be liable to be taken in execution at law or in equity at any time after the passing of this Act, and before the 1st day of September, 1868, where the judgment on which execution issues is recovered in an action on a contract entered into after the passing of this Act, or in an action not on a contract commenced after the passing of this Act; but the person who has recovered any such judgment may obtain the appointment of a receiver, and, if necessary, of a manager, of the undertaking of the company, on application by petition in a summary way to the Court of Chancery in *England* or in *Ireland*, according to the situation of the railway of the company; and all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed, under the direction of the Court, in payment of the debts of the company, and otherwise according to the rights and priorities of the persons for the time being interested therein; and on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such receiver or such receiver and manager." Made perpetual by 38 & 39 Vict. c. 31.

C. A. 1888

In re MERSEY RAILWAY COMPANY.

On the 24th of December, 1887, the corporation of *Birkenhead* recovered judgment against the company for £5099. They then presented a petition stating their willingness that subject to the claims of *John Waddell & Sons*, Messrs. *Bouverie* and *Mason* should be appointed receivers and managers of the undertaking on behalf of the Petitioners. They asked for the appointment of a receiver and manager, and the proper directions, accounts, and inquiries, and that the company might pay the costs.

The petition was heard by Mr. Justice *Kekewich* on the 11th of January, 1888.

Hastings, Q.C., and *E. Ford*, for the Petitioners.

W. P. Beale, for the Railway Company.

KEKEWICH, J.:—

It is an anomalous thing to appoint a manager of a railway company's business when there is a manager already in possession, and it is something different from the appointment of a second receiver without prejudice to the receiver already in possession. The section to my mind is one of considerable difficulty, The view I take of it is this. Before this Act the engines and other chattels mentioned in the 4th section were seizable by a judgment creditor—on the ground of public policy his right to seize them was taken away, and in lieu of it the right of obtaining a receiver and manager was given to him. That right, by the words of the section, is given to every person who has recovered any such judgment as therein mentioned, and there is nothing in the section to shew that only one person is to obtain the appointment, and a special remedy provided by the Legislature being here substituted for the common law right of execution, it would seem right that the special remedy should take the place of the common law right in every case. A difficulty arises on the words at the end of the section which provide that "on payment of the amount due to every such judgment creditor as aforesaid, the Court may, if it think fit, discharge such receiver or such receiver and manager." I think that the words "every such judgment creditor as aforesaid" must mean the judgment

creditor in each case who has obtained the order for the appointment of a receiver and manager, and that gives him a sort of conduct of the proceedings which might possibly oust another judgment creditor. But, be that as it may, falling back on the earlier part of the section, I think that as a special remedy is substituted for the common law remedy, and the judgment creditor cannot have that special remedy, whatever it may be worth, without the appointment of a receiver and manager, the appointment ought to be made appointing the same persons to be receivers and managers without prejudice to the order of the 23rd of December, 1887, the receivers not to act without leave of the Judge. The costs of the Petitioners will be added to their debt.

C. A.

The company appealed from this decision, and the appeal was argued on the 1st and 8th of February, 1888.

Buckley, Q.C., and *W. P. Beale*, for the Appellants:—

It will be said on the other side that an order of this kind is harmless, but it is by no means harmless to the company that a succession of judgment creditors should obtain receivership orders, the expense of obtaining which will fall on the company. We submit that the Court ought to decide what Mr. Justice *Kekewich* declined to decide, whether the obtaining a receivership order gives any priority to the judgment creditor who obtains it. If it does, we admit that the appeal must fail, but if it does not, we say that expensive orders ought not to be made which are of no benefit to any one. Section 4 of the *Railway Companies Act*, 1867, was passed to prevent rolling stock being taken in execution, and also to give the Court power which, according to *Gardner* v. *London, Chatham and Dover Railway Company* (1), it did not previously possess of appointing a manager as well as a receiver of a railway. The section prevents the taking rolling stock in execution, and gives the judgment creditor a different remedy, the appointment of a receiver and manager who is to apply the profits under the direction of the Court in payment of the debts of the company and otherwise according to the rights

(1) Law Rep. 2 Ch. 201.

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and priorities of the persons for the time being interested therein. The section recognises existing priorities, but shews no intention to create any; there is nothing from which it can be inferred that the judgment creditor who obtains the order is to have priority over any one else. If he had taken out execution against the rolling stock he would have had priority as against that, but it cannot be concluded from that that he must have priority against a different description of property which could not have been taken by the sheriff. We say then that getting a receivership order gives him no priority. The clause as to discharging the receiver means, as we contend, that he may be discharged when all judgment creditors whose judgments were so obtained as to qualify the creditors for obtaining receivership orders have been paid. The section is much discussed in *In re Manchester and Milford Railway Company* (1), but the remarks there do not throw much light on the question now before the Court.

Hastings, Q.C., and *E. Ford*, for the corporation of *Birkenhead* :—

There is nothing in the section to confine the obtaining a receiving order to one judgment creditor only, and the close of the section imports that several judgment creditors may obtain receiving orders, for the only natural construction of "every such judgment creditor" is every judgment creditor who has obtained a receiving order.

[Lindley, L.J.:—Have you issued a *fi. fa.*? The section says "the judgment on which execution issues," which appears to confine the application to judgment creditors who have issued execution.]

We have not, and it has never been the practice since the Act to do so. Probably if a judgment creditor issued a *fi. fa.*, and could find sufficient chattels not protected by sect. 4 to cover his debt, he could not obtain a receivership order, but the seizable goods of railway companies, exclusive of plant and rolling stock, are never sufficient to make it worth while to resort to that remedy. If the receivership is for the benefit of all the creditors, why should it be put an end to as soon as the judgment creditors

(1) 14 Ch. D. 645.

are paid? The Act shews an intention to preserve priorities, the judgment creditors would have had priority according to the delivery of their writs to the sheriff as against the rolling stock; the Act takes away their remedy against that, and gives them a substituted right, and their priorities ought to be continued against the substituted property. It was intended to preserve their rights, except so far as it was necessary to modify them for the benefit of the public.

[COTTON, L.J.:—This seems a possible construction—that there is only to be one receiver, and that he should pay the judgment creditors according to the order of delivery of their writs of execution. But the statute says that the rolling stock shall not be seized, so the foundation for priority is gone. A remedy is given against a different property by the appointment of a receiver, but what is there to create similar priorities as to that property?]

It is impossible to pay all the judgment creditors present and future *pari passu*, which leads to the view that some priority was intended. If all creditors present and future are to be paid by the receiver, the receivership could never come to an end. There is no more objection to the appointment of successive receivers here than in other cases where a receiver is applied for as a way of obtaining equitable execution.

[THE COURT asked whether Messrs. *Waddell*, who had obtained the first receivership order were before the Court, as the decision might turn upon grounds which would affect their interest.]

Farwell appeared for Messrs. *Waddell*, and stated that they did not claim any priority by reason of having obtained the first receivership order.

Buckley, in reply:—

The Respondents contend that the rights of judgment creditors are preserved except so far as was necessary for the benefit of the public. But the Act does not preserve their rights at all against the property which before its passing they could take in execution, it gives them a new and different right against other

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property. A receiver appointed under the section is not the petitioner's receiver, for he is directed to apply what he receives in payment of the debts of the company, not of the petitioner's debt in particular. His possession is quite different from that of the sheriff, who enters on behalf of the judgment creditor who put him in motion. The inquiry in the order is substantially an inquiry as to what is due to everybody. Under this section it is immaterial whether the company has any rolling stock or not, which shews how completely the right given by the section is a new right.

As to the words at the end of the section their interpretation is helped by the fact that the section applies only to a certain class of judgment creditors who are entitled to obtain a receivership order under it. "Every such judgment creditor" may then well be construed as meaning every judgment creditor bound by this section and who could get a receivership order under it. When all such are paid the receiver may be discharged, and the existence of an unsatisfied judgment which would not entitle the holder to obtain an order will not prevent the discharge.

1888. Feb. 9. Cotton, L.J.:—

This is an appeal by the *Mersey Railway Company* from an order of Mr. Justice *Kekewich* appointing under sect. 4 of the *Railway Companies Act*, 1867, a receiver and manager of the undertaking of the railway company, after a similar order had been made on the application of another judgment creditor. The question turns upon this, whether a judgment creditor by obtaining an order for a receiver gets any priority, and whether by obtaining such an order, when there is already a receivership order in force, he obtains any benefit. If such second order can give no benefit to the judgment creditor who obtains it, the making it only inflicts a useless expense on the company, and it ought not to be made.

Let us then consider the provisions of the Act. Sect. 4, in order to prevent public inconvenience, deprives a judgment creditor of the right he had to take in execution the rolling stock

and plant of a railway company. It substitutes another remedy, which is that an order may be made on the application of the judgment creditor for the appointment of a receiver and manager of the undertaking of the company, who will receive the profits which come from the undertaking. The section does not in terms give any priority to the creditor who obtains the order. The order will enure to the benefit of all the creditors of the company, for the money to be received is to be applied for the benefit of all, but the section does not say that the judgment creditor who obtains the order is to have any special benefit. It is urged that he ought to have priority because he would have obtained priority by taking the rolling stock and plant in execution, and therefore ought to have priority by resorting to this substituted remedy. But the substituted benefit which is given to the creditors is not a remedy against the same thing as that which was liable to be taken in execution. The revenues which the receiver is to receive are not proceeds of the rolling stock and plant, the rolling stock helps the company to acquire them, but a company might carry on business and gain profits without having any rolling stock of its own that could be taken in execution—it might carry on business with hired rolling stock. The substituted remedy, therefore, is given against something quite different from that which the judgment creditor could have taken in execution. Moreover, it appears to have been one object of the enactment to prevent priority being acquired. Originally a writ of execution bound goods from the time of its issue, but the *Statute of Frauds* altered this, and made it bind them only from the time of its delivery to the sheriff—the judgment creditor who first delivered his writ to the sheriff therefore obtained priority. The *Railway Companies Act*, 1867 (30 & 31 Vict. c. 127), s. 4, forbids the taking the rolling stock or plant in execution, and therefore takes away the ground of the creditor's priority, for it prevents the delivery of the writ to the sheriff. On these two grounds, I am of opinion that a judgment creditor obtains no priority by obtaining a receivership order.

It was argued that, looking at the language of the section, we ought to come to the conclusion that priority may be gained

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by diligence. The section enacts that "all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein." It is urged that this recognises the priority of the judgment creditor. I think that argument is a mistaken one. The section recognises the fact that there may be priorities, and probably this was done mainly on the ground that there might be mortgages giving a charge on the undertaking, or other obligations giving priority to the holders of them. The Legislature, as it appears to me, says in substance, "there may be existing priorities of claim as regards these moneys, if there are we do not intend to disturb them—but neither do we intend hereby to create any priorities."

Then the Respondents relied on the closing words of the section, "on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such receiver or such receiver and manager." They urged that this could not be carried into effect unless priorities were allowed, and that "every such judgment creditor" must mean every judgment creditor who has put the Court in motion by obtaining a receivership order. In my opinion "every such judgment creditor" means every judgment creditor whose judgment has been obtained under the circumstances mentioned in the early part of the section. The close of the section then means that the Court may discharge the receivership order when all the judgment creditors who could obtain a receivership order have been paid. It was contended that this would not work, for that on this view the receiver could not be discharged till all the future judgment creditors who should obtain judgment before the order of discharge had been paid. I do not see the inconvenience of this—it would be idle to discharge the receiver while there were a number of unpaid judgment creditors any one of whom could at once obtain a fresh receivership order—and, if it is desired to get rid of the receiver before all the judgment creditors who could

obtain a receivership order have been paid, the company must come to terms with them. The Legislature cannot have intended that the idle form should be gone through of appointing a second receiver who cannot receive anything, there being a receiver in possession under an earlier order. It is absurd to appoint a second receiver who cannot do anything. We are of opinion, therefore, that no such second receivership order as that under appeal ought to have been made, since it only causes useless expense without giving the applicant any benefit. The order must be discharged, but without costs, as it would be hard to order the judgment creditor to pay them in a novel case of so much general importance and of some difficulty.

LINDLEY, L.J. :—

This case turns on the construction of the 4th section of the *Railway Companies Act*, 1867. The facts are simple. A judgment creditor obtained against the company an order for a receiver in the form originally settled by Lord Justice *James* in *Re Stafford and Uttoxeter Railway Company*, and which is to be found in *Seton* on Decrees (1). This order is still subsisting. The persons thereby appointed are now receivers. Another judgment creditor has presented a petition asking for another order in the same terms. Mr. Justice *Kekewich* has acceded to this, and has made a receivership order without prejudice to the first order, and without deciding anything as to priorities. The question before us is whether he was right in so doing.

It is obvious that unless some benefit is to be got by making a second order, it ought not to be made. The Respondents contend that it gives them priority over judgment creditors who have not obtained such an order. If that be so there would be a reason for making a succession of receivership orders. That raises the question whether sect. 4 gives any priority to a judgment creditor who obtains an order under it. The section consists of three parts. The first part prohibits the taking of rolling stock and plant in execution. The effect of that is that it is of no use for a judgment creditor to issue a *fi. fa.* against a railway

(1) 4th Ed. p. 422.

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company unless the company has other property which is not protected by the section. There may be such other property, but if not, the judgment creditor cannot get anything under a *fi. fa.* The judgment creditor therefore loses his means of getting priority by a seizure of the rolling stock and plant. The second part enables the judgment creditor who has lost his right of seizure to get at property which the sheriff could not have touched. A new remedy is given him which is not strictly substitutional, for it gives a remedy which can be enforced though the company may have no rolling stock or plant. It may be working its line with hired rolling stock and plant, but even then a receivership order can be obtained under sect. 4.

The third part of the section prescribes what the receiver is to do with the moneys he receives. They are to be applied under the direction of the Court "in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein." That evidently lets in all creditors, they are to be paid "according to the rights and priorities of the persons for the time being interested therein," *i.e.*, in the moneys. There is no indication of an intention to create priorities. Then follows the provision "on payment of the amount due to every such judgment creditor as aforesaid the Court may, if it think fit, discharge such receiver or such receiver and manager." The first question here is, What is the meaning of the words "every such judgment creditor as aforesaid?" I see nothing to which they can be referred except the first part of the section, which deals with judgment creditors whose judgments are recovered in actions on contracts entered into after the passing of the Act, or on actions not on a contract commenced after the passing of the Act. It was argued, and I was at first much struck by the argument, that, as you cannot pay off present and future judgment creditors *pari passu*, it must have been intended that they should be paid according to their priorities. But if the company can by any means get rid of the judgment creditors, the order may be discharged without their having been paid. The section, as it appears to me, respects existing priorities, but does not create any new ones. There is then no use in a succession of receivership orders, and a second

ought not to be made when there is one in force. I agree as to the costs, for the question is new and difficult.

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Bowen, L.J.:—

I am of the same opinion.

Solicitors for Railway Company: *Baxter & Co.*
Solicitors for Corporation of *Birkenhead: Venn & Co.*
Solicitors for *Waddell & Sons: Deacon, Gibson, & Medcalf.*

H. C. J.

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Jan. 31;
Feb. 1, 6.

TENNENT *v.* WELCH.

Husband and Wife—Wife's Real Estate—Conveyance—Acknowledgment—Separate Examination—Purchase-money—Trustees—Indemnity Fund—Chose in Action—Reduction into Possession—Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *ss.* 77, 79, 80, 84, 89 [*Revised Ed. Statutes, vol. vii. p.* 511–514]—*Reg. Gen.*, 1834, *Rule iii.*

One of the essential purposes of the separate examination of a wife on a sale and conveyance of her real estate by herself and her husband under the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), is to ascertain whether the purchase-money is to belong to her husband or not. Accordingly, when she has acknowledged the conveyance before the commissioners and has, on being separately examined by them, refused any provision out of the purchase-money or otherwise, she must be treated as having given up to her husband all claim upon the purchase-money and as having no further interest in it either at law or in equity. This is the case even if the purchasa-money or any part of it is left outstanding in trustees by way of an indemnity fund against charges on the estate; as, for instance, in the case of part being vested in trustees by a deed of declaration of trust for the purpose of keeping down an annuity originally charged on the estate and subject to which it is sold; consequently, in such a case, in the event of the wife surviving the husband, and the fund still remaining outstanding, she cannot, as against his estate, claim the fund as her *chose in action* not reduced into possession by the husband.

The effect of a married woman's acknowledgment and separate examination under the *Fines and Recoveries Act*, discussed.

In 1876, Mrs. *Hamilton Dunbar Tennent*, widow, a Scotch lady, being seised in fee simple of the *Overton* estate in *Shropshire*, commenced negotiations by her agent with the agent of Lord *Boyne*, an adjoining landowner, for the sale of the estate to Lord *Boyne*, the negotiations being conducted by a correspondence between the two agents.

On the 24th of March, 1877, while the negotiations were still in progress, and after the price to be paid for the property had been settled, Mrs. *Tennent* married *Charles Welch*, a domiciled Scotchman, who thereupon assumed the name of *Tennent*. No settlement was executed on such marriage.

After the marriage the negotiations for the sale and purchase of the *Overton* estate still proceeded, but were never reduced into a formal contract for sale. They, however, eventually resulted in a conveyance of the estate being executed by Mr. and Mrs. *Tennent*,

by Lord *Boyne's* directions, to the trustees of his marriage settlement.

This conveyance was dated the 24th of July, 1877, and was made between Mr. and Mrs. *Tennent* of the first part, Lord *Boyne* of the second part, and the trustees of Lord *Boyne's* settlement of the third part. It contained the following recitals: "Whereas the said *Charles Welch Tennent* and *Hamilton Dunbar* his wife are, in right of the said *H. D. Tennent*, seised of and well entitled to the manor, &c., and hereditaments hereinafter declared and expressed to be hereby granted for an estate of inheritance in fee simple in possession therein, subject to an annual rent-charge or sum of £200 payable to *Helen Howarth Tennent*, widow, during her life" (the annuitant being then aged sixty-nine), and to a lease of part of the estate to one *Cresswell*: "And whereas the said *Charles Welch Tennent* and *Hamilton Dunbar*, his wife, some short time since agreed with the said (Lord *Boyne*) for the sale to him of the said manor, &c., and hereditaments, and the inheritance thereof in fee simple in possession free from incumbrances, except the said annual sum or rent-charge of £200, and subject to the said indenture of lease and to the vendor's future obligations thereunder, at or for the price of £21,675, on the terms that, in addition to the amount of his purchase-money, the purchaser should pay for all timber" on the property at a valuation to be made by certain valuers or their umpire: "And whereas it was another of the terms of the said agreement for sale and purchase that the said rent-charge of £200 per annum should not be released, but that in order to indemnify the purchaser against the payment of it the sum of £5500 should be invested by the purchaser, who should retain that amount from the purchase-money, in the names of" three persons, naming them, "as trustees for the purpose of indemnifying the purchaser against the said rent-charge," and that, if necessary, a declaration of trust should be executed by such trustees. It was also further recited that it was agreed that a sum of £1000 should be retained by Lord *Boyne* to await the result of an arbitration then pending relative to a claim against Mr. and Mrs. *Tennent* by *Cresswell* under his lease for damages in respect of certain alleged breaches of the lessor's covenants, and that Mr. *Tennent* should covenant to

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indemnify the purchaser against all liabilities under the lease. The deed then proceeded: "And whereas it was another term of the said agreement that due provision should be made by the declaration of trust to be made of or as to the said sum of £5500 for the payment thereout of all succession duty to become payable on or in respect of the cesser of the said rent-charge of £200 per annum." Then—after reciting Lord *Boyne's* marriage settlement, which contained a power for the trustees to purchase freehold hereditaments to be conveyed to the uses of the settlement, and the appointment of the present trustees of the settlement; also that Lord *Boyne* had requested that the said manor and hereditaments should be conveyed by Mr. and Mrs. *Tennent* to the uses therein declared; that the timber on the property had been valued and was to be taken at £1833; that the said £1000 agreed to be retained by Lord *Boyne* as such purchaser as aforesaid had been retained by the trustees, as the purchasers substituted for him, out of the said purchase-money of £21,675, and that a declaration of trust as to that sum was about forthwith to be executed by them—the deed proceeded: "And whereas the said sum of £5500 hath, as between the said *C. W. Tennent* and *Hamilton Dunbar* his wife, as such vendors as aforesaid, on the one hand, and the said" trustees and Lord *Boyne* "as such substituted and original purchasers and purchaser as aforesaid on the other hand, been set apart and retained out of the said purchase-money or sum of £21,675, and, as between the said Lord *Boyne* on the one hand and the said (trustees) on the other hand, hath been found or advanced by the said Lord *Boyne*, and hath been or is about forthwith to be invested in the manner provided by the declaration of trust relating to the same, which is already engrossed and intended to bear even date with these presents, as an indemnity against the said annual rent-charge or sum of £200, as by the terms of the said agreement for sale provided: Now this indenture witnesseth that, in pursuance and performance of the said agreement for sale, and in consideration of the sum of £5500 so, as between the said vendors and the said purchasers, retained out of the said purchase-money or sum of £21,675, and invested or to be forthwith invested as aforesaid, and in consideration of the sum of £1000 so retained by the said (trustees) as aforesaid,

and of the sum of £15,175 upon the execution of these presents, as and for the balance of the said purchase-money of £21,675, and of the sum of £1833, as and for such timber-money as aforesaid, paid by the same trustees at the request of the said Lord *Boyne* (testified by his being a party to and executing these presents), and the payment and retention and receipt of which said sums of £5500, £1000, and £15,175, making together the full purchase-money of £21,675, and the receipt of which said sum of £1833 for such timber-money as aforesaid, the said *C. W. Tennent* and *H. D. Tennent* do and each of them doth hereby admit and acknowledge, and of and from the said purchase-money of £21,675 and the said sum of £1833 for timber-money, do and each of them doth hereby release the said (trustees) and the hereditaments and premises hereinafter expressed to be hereby granted, she, the said *H. D. Tennent*, with the concurrence of the said *C. W. Tennent*, and at the request of the said Lord *Boyne* (testified as aforesaid), doth hereby grant, release, and dispose of, and he, the said *C. W. Tennent*, at the like request, so testified as aforesaid, doth hereby grant, release and confirm unto the said (trustees) their heirs and assigns," the said manor and estate of *Overton*, "and all the estate, right, title, interest, property, claim and demand whatsoever, both at law and in equity, of them the said *H. D. Tennent* and *C. W. Tennent* in, to, upon or out of the same hereditaments and premises and every part of them," to have and to hold the said manor and hereditaments unto the said (trustees) their heirs and assigns, "subject, as to the whole of the same hereditaments and premises, to the said annual rent-charge or sum of £200 per annum," and, as to the portions of the same hereditaments comprised therein, to the said lease to *Cresswell*, to the uses declared by Lord *Boyne's* said marriage settlement.

This deed was executed by all parties and indorsed on it was a memorandum of acknowledgment by Mrs. *Tennent*, signed by two commissioners, in the form given in sect. 84 of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74).

There was also indorsed on the deed a receipt, signed by Mr. and Mrs. *Tennent*, for the full purchase and timber moneys, "being the respective consideration moneys within expressed to be paid to us."

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The two commissioners made the usual certificate of acknowledgment of the deed, in the form given in sect. 84, and the usual affidavit verifying the certificate was made by one of the commissioners in the form required by the rules issued under the Act, stating that, in answer to an inquiry, Mrs. *Tennent* declared her intention of "giving up her interest in the said estate without having any provision made for her in lieu of" such interest.

By a deed of declaration of trust of even date with the conveyance, and made between certain persons, as trustees, of the one part, and Mr. and Mrs. *Tennent* of the other part, after reciting that the above-mentioned £5500 had been retained out of the said purchase-money of £21,675 and was then in the hands of the trustees, parties to the present deed, and that it had been arranged that such a declaration of trust of the said £5500 should be entered into as was thereinafter contained: It was witnessed and declared that such last-mentioned trustees should invest the said £5500, as directed by Mr. and Mrs. *Tennent* or the survivor, in the securities therein mentioned, and should, out of the income of the investments, in the first place keep down the said annuity of £200, and in the second place defray the costs incurred by the present trustees in keeping down such annuity, and in the third place pay the residue of the income "to the said *C. W. Tennent* and *Hamilton Dunbar* his wife, or their executors, administrators, and assigns, according to their rights or interests therein as by law from time to time for the time being determined or regulated;" and, after the death of the annuitant, should stand possessed of the capital trust fund and income upon trust in the first place to raise and pay the succession duty payable on the death of the annuitant; and in the second place to raise and pay any costs incurred by the present trustees in the execution of the trusts, "and, subject to the trusts aforesaid, shall stand and be possessed of the residue of the said capital trust fund, and the income of the same capital trust fund, in trust for the said *C. W. Tennent* and *Hamilton Dunbar* his wife, their executors, administrators, and assigns, according to their rights or interests therein as by law from time to time for the time being determined or regulated."

This deed was duly executed by all parties.

By another deed of the same date, trusts were declared of the £1000 retained by way of indemnity against *Cresswell's* claim under his lease.

The whole or the greater part of the purchase-money expressed by the receipt indorsed on the conveyance to be paid to Mr. and Mrs. *Tennent* was in fact received by Mr. *Tennent* alone.

In 1881 Mr. and Mrs. *Tennent* separated, and in 1883, while they were still living apart, Mrs. *Tennent* commenced an action in the Court of Session in *Scotland*, as pursuer, against her husband, as defender, to recover, amongst other sums of money alleged to be her property, the purchase-money for the *Overton* estate which had been received by himself, and also to have it declared that the right to the £5500 above-mentioned was vested in her, and that she was entitled to have the same paid to her on the cesser of the annuity.

On the 8th of October, 1884, while that action was pending, Mr. *Tennent* died, he being still a domiciled Scotchman. The action was thereupon revived against his executor.

There was no issue of the marriage of Mr. and Mrs. *Tennent*.

The annuitant was still living.

The action now came before this Division of the High Court upon a special case submitted by the Scotch Court under the *Law Ascertainment Act* (22 & 23 Vict. c. 63).

The following were the questions submitted:—

(1) Whether at the date of Mrs. *Tennent's* marriage there was a valid and binding contract for the sale of the *Overton* estate, enforceable by specific performance; (2) whether such contract operated as a conversion of the estate into personalty, so as to vest the proceeds in the original defender, the husband, absolutely at the date of the marriage; (3) whether the contract was by English law a *chose in action*, so that the proceeds did not become the property of the husband until the reduction of the same into his possession; and, in the event of the Court deciding that no valid and binding contract for the sale of the *Overton* estate existed prior to the marriage, and that the husband took no interest in the purchase-money, (4) what, after their marriage, were the respective rights or interests of the husband and

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wife by the law of *England* in the *Overton* estate, and were those rights or interests, or either of them, saleable by them or either of them, and on what conditions; (5) what, on the conveyance of the estate, were the husband's right and interest in the purchase-money by the law of *England*, and did such right and interest pass to the husband by the conveyance or by his *jus mariti*; and (6) whether the wife was entitled absolutely to the £5500 under the deed of declaration of trust thereof, she having survived her husband, or whether she was otherwise entitled to it as a *chose in action* not reduced into possession by her husband during coverture.

The only point in the case calling for a report was as to whether Mrs. *Tennent*, by her act in acknowledging the deed of conveyance pursuant to the provisions of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), gave up all her interest, not only in the purchase-money expressed to have been actually paid to herself and her husband, but also in the £5500 left outstanding in trustees—whether such sum should not be treated as her *chose in action* not reduced into possession by her husband in his lifetime.

As the burden of proving conversion by actual contract lay upon the Defender, his case was opened first.

Rigby, Q.C., and *C. B. McLaren*, for the Defender:—

We contend that at the date of the marriage there was, upon the correspondence, a good contract operating as a conversion of the *Overton* estate into personal estate, so as to vest the proceeds in the husband absolutely. Upon the execution of the conveyance so much of the purchase-money as was actually received by the husband undoubtedly belonged to him, but the question is whether the £5500 left outstanding in trustees belonged to the husband and now forms part of his estate, or whether it now belongs to the wife as being property of hers not reduced into possession by the husband. That question depends upon another—what is the effect of a married woman's examination and acknowledgment under the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), upon a conveyance of her real estate by herself and her husband? We submit that the effect is to give up all the wife's interest in the purchase-money: sects. 77, 79, 80 and 84; Reg.

Gen., 1834, rule 3, which directs that before taking the acknowledgment the married woman shall be asked whether she intends to give up her interest without any provision: *Shelford's* Real Property Statutes (1). The purchase-money is not the wife's personalty, it is money produced from real estate in which she and her husband each had certain rights. It is personalty representing their respective interests in that real estate, but the Act provides no machinery for ascertaining how much of it is the wife's, or in what proportions the money belongs to her and her husband respectively. The acknowledgment by the wife is, in effect, an arrangement between her and her husband that she shall not have any of the money. It is therefore impossible to say that, when the husband dies, the wife can claim any part of it. No case is to be found in the books in which, where the respective interests of the husband and wife are undefined, as in the ordinary case of a sale of lands of which the wife is seised in fee simple, and the wife is examined pursuant to the provisions of the Act, it has been held that any part of the purchase-money must be treated as belonging to the wife.

Marten, Q.C., and *H. E. Hirst*, for the Pursuer:—

We submit that at the date of the marriage there was no binding contract for the sale of the *Overton* estate so as to effect a conversion, and accordingly that upon her marriage Mrs. *Tennent* continued to have an interest in the estate. The marriage in fact operated as a gift of the estate to the husband and wife during their joint lives, with remainder to the wife absolutely, subject to any right of the husband as tenant by the curtesy. The question is whether a conveyance by the husband and wife, acknowledged by the latter, affects their respective rights in the purchase-money as between themselves. We submit that when, upon the inquiry by the commissioners under rule 3, the wife expresses her intention of "giving up her interest," that means she gives up her interest as between herself and the purchaser, and that the inquiry cannot affect any rights subsisting in the purchase-money as between herself and her husband. Upon the face of the deed, as it lies before the commissioners, the pur-

(1) 8th Ed. p. 400; 10 Bing. 458.

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chase-money is expressed to be paid to both, and the receipt is given by both, any statement depriving her of her rights in the purchase-money being carefully excluded. The terms of the acknowledgment and the receipt are not to be pressed against the wife beyond what is necessary to secure the purchaser. While the money is in the hands of the two, as stated in the receipt, the wife may still assert her equity to a settlement.

[KAY, J.:—The commissioners would no doubt ask her—as a Judge is accustomed to ask a married woman on her separate examination in Court—"Do you wish the money to be paid to your husband"; if she says "Yes," how could she claim her equity after that?]

In the ordinary case of a married woman's examination in Court on a petition for payment out of her fund to her husband, supposing that after her examination, and while the fund is *in medio*, that is, before the order is drawn up and the money has got into anyone's hands, the married woman changes her mind and says she wishes to assert her equity, the Court would give effect to her wish. So, in the case of her concurrence in a conveyance of her land, and of her examination and her acknowledgment of the deed, she concurs only according to the tenor of the deed, that is, in the payment to herself and her husband jointly, and she does not by so doing lose her equity. The Court of Common Pleas acted *ultrà vires* in framing rule 3. All the Act says is (sect. 79), that the deed, upon the married woman executing the same, is to be produced and "acknowledged by her as her act and deed" before a Judge, Master in Chancery, or commissioners, who (sect. 80) are to "examine her apart from her husband" touching the knowledge of such deed, and "shall ascertain whether she freely and voluntarily consents to such deed"; and sect. 89 empowers the Court of Common Pleas to make rules touching the mode of examination. So that the only two points on which she is to be examined are as to her knowledge of the deed and as to her voluntary consent. The statute nowhere requires that she shall be examined as to whether she intends to give up her interest in the purchase-money as between herself and her husband; and therefore we submit that no weight should be given to rule 3, or

any examination under it, beyond the literal provisions of the statute. At any rate, whatever may be the case as to the purchase-money that was actually paid at the time of the conveyance, Mrs. *Tennent* is clearly entitled to the outstanding £5500.

[KAY, J.:—The question is, can this be treated as a *chose in action* belonging to the wife?]

We submit that it can. Having regard to the terms of the declaration of trust, we say that this sum was substituted, *pro tanto*, for the estate.

[KAY, J.:—Supposing the sum outstanding in trustees had been the whole purchase-money, would it then have been a *chose in action* of the wife?]

Yes; and the husband not having reduced it into possession during the coverture, it would now belong to the wife. We submit that that is so as regards the £5500.

[KAY, J.:—I admit that, provided you can shew it was a *chose in action* of the wife.]

The object of the declaration of trust was that both the income and the capital of the trust fund should be dealt with precisely in the same way as the income and *corpus* of the estate would have been dealt with; the husband and wife are to have the same rights in the money as they would have had in the land; there is nothing in the deed to alter those rights.

Rigby, in reply:—

[KAY, J.:—Supposing the wife says: "I give up all my interest in the estate," and the purchase-money remains out on mortgage, and the husband receives the interest during his life and then dies; is not the money the wife's *chose in action*?]

No; the money cannot in any way be treated as real estate; it is in fact personal property as to which there has been an arrangement—an arrangement that led to the sale—that the wife shall claim no interest in it. The renunciation by the wife before the commissioners is absolute. This is not a *chose in action* at all; the doctrine of reduction into possession cannot apply to a case where, as here, the wife has, before the commissioners, given up

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everything. Accordingly, whether the purchase-money is vested in trustees or not, if the wife does not, when her examination is taken, stipulate for any provision out of it, she loses all interest in it, and the money becomes the property of the husband.

1888. Feb. 6. KAY, J., upon the first question in the case—namely, whether the correspondence relating to the sale and purchase of the *Overton* estate amounted to a binding contract within the *Statute of Frauds*—held that there was no completed contract at the time of Mrs. *Tennent's* marriage. His Lordship then proceeded:—

Assuming that no valid and binding contract for the sale of *Overton* had been entered into before the marriage, there was no such contract until the conveyance was executed; and the next question is, what was the effect of that conveyance?

By sect. 77 of the 3 & 4 Will. 4, c. 74, Mrs. *Tennent* was enabled by deed to dispose of the *Overton* estate as fully and effectually as she could do if she were a *feme sole*, "save and except that no such disposition . . . shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed."

By sect. 79 the deed, upon the married woman executing the same, or afterwards, is to be "produced and acknowledged by her as her act and deed" before a Judge, Master in Chancery, or commissioners, who, by sect. 80, before they receive such acknowledgment, are to "examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed;" otherwise they are not to permit the acknowledgment, and the deed, as to her execution, is void.

Sect. 84 gives forms of a memorandum and certificate of acknowledgment, and sect. 89 provides that the Court of Common Pleas shall make orders and regulations touching the mode of examination by commissioners, and so on.

Rules were made, the third of which provides that the commissioners shall inquire of every married woman, separately from her husband and from the solicitor concerned in the transaction,

"whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest: and where such married woman in answer to such inquiry shall declare that she intends to give up such her interest without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment;" but if it appears to them that it is intended that a provision is to be made for the married woman, they are not to take the acknowledgment until the provision has been actually made or the terms of it reduced into writing, which they are to verify by their signatures.

In this case all these ceremonies seem to have been strictly observed, and Mrs. *Tennent* did not require any provision. The effect of the conveyance was to convert the estate into personalty upon the execution of the deed. Supposing the parties to have been domiciled in *England*, it would follow from the mere fact of such conversion that the husband by his marital right would become entitled at once to whatever interest the wife might have in such personal property. But after making such acknowledgment, and declining any provision out of the purchase-money, or otherwise, it is difficult to see how the wife could have any possible interest in such purchase-money. The land could not have been converted into money, even as to the wife's interest in it, without the concurrence of the husband in the deed, not merely because he had an estate in the property in his marital right, but because the statute expressly makes his concurrence an essential requisite to any disposition by the wife.

The husband might have conveyed away the life estate which he acquired by marriage in the wife's land without her joining or consenting: *Co. Litt.* (1); *Robertson* v. *Norris* (2). But the wife is in a different position. She could not convey or bind in any way such interest as she had in the property unless the husband concurred in the deed. Consequently, when the sale by husband and wife of the wife's land has taken place, if it is competent to inquire on what condition the husband gave his concurrence, it

(1) Page 326a, n. (2) 11 Q. B. 916.

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seems impossible, where the wife has refused any provision on her separate examination, to come to any other conclusion than that the purchase-money was to belong altogether to the husband, and that the wife was not to have any interest in it either at law or in equity. If she could afterwards assert a right to any interest in it, her refusal of a provision would be altogether nugatory. The statute and the rules obviously intend to put her in the position that she may decline to execute the deed, and the commissioners may prevent her execution, or may refuse to receive the acknowledgment which alone could make her execution valid, if a provision is not made for her in case she desires it.

As to any purchase-money actually received by the husband it is impossible, after declining any provision, that she could assert any claim against this. But it has been argued that the same considerations do not apply to the £5500 which was set apart to answer the annuity. The trusts of this were declared by a deed dated the 24th of July, 1877, to be, out of the income to pay the annuity of £200, and next the costs of the trustees, and then to pay the residue of the income to Mr. and Mrs. *Tennent*, or their executors, administrators, and assigns, according to their rights or interests therein as by law from time to time for the time being determined or regulated; and after the death of the annuitant the capital was to be applied in payment of succession duty and costs, and the residue was to be in trust for Mr. and Mrs. *Tennent*, their executors, administrators, and assigns, according to their rights or interests therein as by law from time to time for the time being determined or regulated.

Mrs. *Tennent* having survived her husband, and the annuitant having also survived him, the question is whether she is entitled to this money either under the provisions of this deed or as a *chose in action* not reduced into possession by the husband in his lifetime.

The deed merely preserves such rights as she might have according to law, and obviously did not intend to confer upon her any right if in law she had none. The only right in law which she could have would be on the supposition that this £5500 was her *chose in action* not reduced into possession by the husband. In order to make this out it is essential to shew that

it was a *chose in action* originally belonging to the wife. This certainly was not the case as to the whole of it. Some part of it was the purchase-money of the husband's freehold interest in his wife's real property. Some part also must be treated as the price of his permitting the wife to sell her interest by concurring in the conveyance. How can it be ascertained how much of it was the wife's *chose in action?*

These considerations seem to me to throw light on the intention of the Act and rules. Suppose all the purchase-money had been left outstanding on securities by way of mortgage given by the purchaser, the question would be the same. Could the wife surviving the husband claim that fund or any part of it against his executor? The answer to such claim would be, "When you were separately examined you relinquished all claim to a provision out of the purchase-money or otherwise. The effect was to make such purchase-money the absolute property of the husband. Your right by survivorship is only to a *chose in action* which belonged to you and which your husband by his marital right might have reduced into possession, but did not; but the indefinite interest which you had in this purchase-money you entirely relinquished by declining to claim any provision, and therefore no part of this money ever was your *chose in action.*"

The truth seems to me to be that one of the essential purposes of the separate examination of the wife is to ascertain what is the bargain between her and the husband—that is, whether the purchase-money is to belong to him or not. If she declines to have any provision made for her, the arrangement must be that she gives up to her husband all claim upon the purchase-money, and the doctrine of reduction into possession does not apply.

For these reasons I am of opinion that, under the circumstances of this case, the £5500 cannot be treated as a *chose in action* to which the wife is entitled, but that if the domicil of the husband and wife had been English the whole would now belong to the executor of the husband.

It was argued that if this be the effect of the rules made by the Common Pleas they are *ultrà vires.* That is not my opinion. By sect. 89 the Court was to make rules "touching the mode of examination." By sect. 80 the commissioners are to examine

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the wife apart from her husband "touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed." These matters could not be ascertained satisfactorily, if at all, without bringing it clearly before the mind of the married woman that she might insist on having a provision made for her out of the purchase-money, or otherwise, before she consented to execute, and the questions which the commissioners are by the rules directed to put are apt for this purpose.

The answers to the questions submitted to me must be—(1.) At the date of her marriage to the original Defender, namely, the 24th of March, 1877, no valid or binding contract of sale of *Overton* had been entered into by or on behalf of the Pursuer as vendor and Lord *Boyne* or his trustees as purchasers. This makes it unnecessary to answer questions 2 and 3. The succeeding questions I answer thus:—(4.) After the marriage the estate of *Overton* belonged to Mrs. *Tennent* in fee simple subject to a freehold estate of the husband therein during the continuance of the coverture: *Co. Litt.* (1); *Robertson* v. *Norris.* (5.) These rights and interests were saleable by them, as to the husband's estate, without the concurrence of the wife: *Robertson* v. *Norris* (2); as to the wife's estate, only with the concurrence of the husband in an acknowledged deed under the conditions imposed by 3 & 4 Will. 4, c. 74, and the rules thereunder, to which I have referred. On the conveyance of the estate by the deed of the 24th of July, 1877, the original Defender became by the law of *England* absolutely entitled to the price thereof. Such right and interest in the price passed to him by the conveyance and by the refusal by the wife upon her separate examination of any provision, rather than by the *jus mariti.* And (6) for the same reasons, under the trusts of the indenture or trust deed of the 24th of July, 1877, the Pursuer is not entitled by the law of *England* to the sum of £5500, either as having survived her husband or as a *chose in action* not reduced into possession by the husband during his coverture.

Solicitors: *C. Turner; Trinders & Co.*

(1) 326a, n. (2) 11 Q. B. 916.

G. I. F. C.

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[1885 A. 1829.]

Will—Construction—Charity—Marshalling—Residuary Gift to Charities with Direction for Payment exclusively out of pure Personalty—"Real Estate"—Land in Colony.

A testatrix gave all her real and personal estate to trustees upon trust to convert, and out of the proceeds pay her debts, funeral and testamentary expenses, and certain legacies bequeathed to private individuals, and directed that all such legacies should in the first instance be payable out of the proceeds of sale of her "real and leasehold estate, if any." She directed her trustees to divide the residue of her estate into three parts and pay the same to certain charities. She then directed that "the foregoing charitable legacies" should be paid "exclusively" out of such part of her pure personal estate as was legally applicable for that purpose. The testatrix had no real or leasehold estates in this country, but was possessed of land in the colony of the *Cape of Good Hope* (the value of which was less than the amount of the general legacies) and of pure and impure personalty:—

Held, that the direction as to payment of the charitable legacies was in effect equivalent to a direction that the residue should consist exclusively of pure personalty, and therefore operated as a direction to marshal for the benefit of the charities; that the general legacies were primarily payable out of the proceeds of sale of the land in the colony; and that the debts and funeral and testamentary expenses and costs of action and the unpaid portion of the general legacies must be paid in the first instance out of the impure personalty, so as to leave the pure personalty, so far as possible, to constitute the ultimate residue.

MARIA M. ARNOLD, of *St. Just*, in the county of *Cornwall*, who died on the 10th of August, 1885, by her will, dated the 29th of June, 1885, gave, devised and bequeathed unto her trustees thereinafter named all her real and personal estate upon trust to sell and convert into money all such parts thereof as should not consist of money, and out of the moneys produced by such sale and conversion, and out of her ready money, to pay all her just debts, funeral and testamentary expenses, and the legacies thereby bequeathed. The testatrix then bequeathed certain pecuniary legacies (amounting in the aggregate to £1370), and continued as follows: "I direct that all the above legacies shall

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be paid as soon as conveniently may be after my death, and shall in the first instance be chargeable upon and payable out of the proceeds of sale of my real and leasehold estate (if any)." As to the residue of her estate not thereby disposed of, the testatrix directed that her trustees should divide the same into three equal parts, and pay and transfer one of such third parts to the bishop for the time being of the diocese of *Capetown*, whom she directed to invest the same as therein mentioned, and stand possessed of the funds and securities representing the same upon trust to pay the income to the minister or incumbent for the time being of *St. Luke's Church, Salt River*, in the diocese of *Capetown*, in augmentation of his stipend or income; and she directed the trustees to pay and transfer one other third part to the Bishop of *Lahore* or his successor, to be applied towards building the new cathedral for the diocese of *Lahore*; and she directed the trustees to pay, transfer, and divide the remaining third part equally between the *Society for the Propagation of the Gospel in Foreign Parts* and the *Additional Curates Aid Society*. The will then continued as follows: "I direct that the foregoing charitable legacies shall be paid exclusively out of such part of my pure personal estate as is legally applicable for that purpose." The testatrix appointed the Plaintiffs, *H. W. Ravenscroft* and *R. Babington*, executors and trustees of her will.

The Plaintiffs duly proved the will.

At the time of her death and at the date of her will the testatrix was entitled to land at *Capetown* in the colony of the *Cape of Good Hope*, of the value of £1237 10*s*. She also died possessed of personal estate connected with land amounting in value to about £4950, and of pure personal estate amounting in value to about £1175. She had no real or leasehold estate other than the land at *Capetown*.

The Defendant, *Walter Workman*, was the sole next of kin and heir-at-law of the testatrix.

It appeared that according to the law of the colony of the *Cape of Good Hope* the will of the testatrix was sufficient to pass the land at *Capetown* to the Plaintiffs, that the land could be disposed of by will for charitable purposes, and that there was no difference according to such law between bequests of moveable and

immoveable estate in respect of the capacity of the owner to bequeath the same for charitable purposes.

This was an action for the administration of the estate of the testatrix. Upon the action now coming on for further consideration the question arose out of what parts of the estate of the testatrix the debts, funeral and testamentary expenses, costs of action and legacies, were to be paid.

Horton Smith, Q.C., and *Fellows*, for the Plaintiffs.

Marten, Q.C., and *C. W. Williams*, for the Defendant *Workman*:—

The proceeds of sale of the land at *Capetown* ought to be first applied in payment *pro tanto* of the general legacies. Then the debts and funeral and testamentary expenses (including the costs of action), and so much of the legacies as remains unpaid ought, in accordance with the general rule, to be paid rateably out of the pure and impure personalty. The gift to the charities is residuary, and there can be no residue until the estate is cleared by such payments being made. The direction in the will as to the mode of payment of the charitable legacies is not equivalent to a direction to marshall in favour of the charities: *Beaumont* v. *Oliveira* (1).

Stock, for the *Society for the Propagation of the Gospel in Foreign Parts*, the *Additional Curates Aid Society*, and the Bishop of *Lahore*:—

The debts, funeral and testamentary expenses, costs of action, and legacies, ought to be paid out of the impure personalty, so as to leave the pure personalty free for the charities. The testatrix has in effect directed that the pure and impure personalty shall be marshalled in favour of the charities.

[KAY, J.:—Where it is intended to give priority to charitable legacies it is usual to insert words to that effect, which I do not find here.]

The only meaning which can be given to the direction is that

(1) Law Rep. 4 Ch. 309.

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the residue given to the charities is to consist exclusively of pure personalty. The case is therefore within *Wills* v. *Bourne* (1).

The land at *Capetown* ought to be treated as pure personalty. The direction in the will charging the general legacies in the first instance upon the proceeds of sale of the real and leasehold estate was inserted merely for convenience of administration, and does not charge the land at *Capetown* in exoneration of the personal estate.

Decimus Sturges, for the Bishop of *Capetown*:—

The testatrix directs that the charitable legacies shall be paid "exclusively" out of the pure personalty; that is, the pure personalty is to be left exclusively for the charitable legacies—exclusively of and untouched by the debts, the funeral and testamentary expenses, the costs of action and the general legacies. The use of the word "exclusively" makes the direction as strong in favour of marshalling as that in *Miles* v. *Harrison* (2). The observations of Lord Justice *Mellish* in that case (3) shew clearly that this direction is equivalent to a direction to marshall.

The land at *Capetown* is not "real estate" within the meaning of the direction in the will charging the legacies upon the real estate. The expression "real estate" is peculiar to English law, and is not appropriate to designate land in a colony.

Marten, in reply:—

The land at *Capetown* cannot be treated as pure personalty. That was decided in *Beaumont* v. *Oliveira* (4) as to the land in *Madeira* which was there in question.

In *Wills* v. *Bourne* there was an express direction that the pure personalty should be comprised in the residue. In *Miles* v. *Harrison* there was a direction that the pure personalty should be reserved for payment of the charitable legacies; and the Court attached importance to that, and treated it as amounting to a direction to marshall. The observations of *Mellish*, L.J., cannot be relied on: they were not necessary for the purposes of the judgment, and were not adopted by the other members

(1) Law Rep. 16 Eq. 487.
(2) Ibid. 9 Ch. 316.
(3) Law Rep. 9 Ch. 322, 323.
(4) Ibid. 4 Ch. 309.

of the Court. The present case is nearest to *Llewellyn* v. *Rose* (1), where there was a residuary gift to charities and a direction as to the mode of payment substantially the same as that in this will; and *Malins*, V.C., held that the general rule must be followed and that the direction as to the mode of payment was nugatory. In *Lewis* v. *Boetefeur* (2) there was a direction to marshall the ultimate residue so that a share of it given to a charity should be paid out of pure personalty, and it was held that notwithstanding that direction the general rule must prevail.

This direction can have a sensible meaning given to it, without being construed as a direction to marshall. If, as might easily have happened, one of the charitable bequests had failed by a failure of the objects, the whole of the pure personalty might have been applicable to make up the shares of residue given to the other charities.

KAY, J.:—

In this case I have to decide what is the true construction of this will. No doubt the rule of law is that although the Courts of Equity, as it is said, favour charities, yet they will not marshall the assets of a testator, so as to make a charitable bequest payable out of the pure personalty, unless there is a direction in the will to that effect. Of course a testator may direct what he pleases, and the proper way to deal with a will in which a question of this kind arises is to construe the will without reference to any rule of law,—to see first what the will means, and then to apply to it the rule of law. The testatrix in this case died possessed of three kinds of property. The first was what we should call real estate: it was land at *Capetown* in the colony of the *Cape of Good Hope;* she had no freehold or leasehold property situate in *England.* A second species of property was personal estate in *England*, which savoured of real estate, and therefore could not be validly bequeathed for charitable purposes in *England;* and the third kind was pure personal estate which could be validly bequeathed for charitable purposes in *England.* The testatrix made her will in these terms:—[His Lordship referred to the terms of the will

(1) W. N. 1869, p. 178.
(2) 38 L. T. (N.S.) 93; S. C. on app. W. N. 1879, p. 11.

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down to and including the direction that the charitable legacies should be paid exclusively out of the pure personal estate, and continued:—] There were no charitable legacies, properly so called; the only gift to charities was a gift of residue. Therefore this direction really comes to this: "I direct that the residue which I have given to charities shall be paid exclusively out of my pure personal estate." Now, in what respect do those words differ in meaning from these: "I direct that the residue which I have given to charities shall consist exclusively of pure personal estate"? I see no difference at all. It is to my mind as if the testatrix had said, "I give my residue to charities, and I direct that that residue shall consist exclusively of my pure personal estate." That means that the executors are to discharge all other payments out of her estate which is not pure personalty in the first instance, and are to reserve, so far as they can, her estate which is pure personalty to pay the charities. That seems to me to be, on the face of the will, without regarding any authority, as plain a direction to marshall, in that sense and to that extent, as could possibly be given. I read the will as meaning this, that the testatrix gives all her residuary estate in a mixed fund to the executors upon trust to convert, and then directs that, subject to the previous purposes of her will being satisfied, the pure personalty shall be reserved, so far as it can be, and be given as residue to the charities.

There is another point arising upon the will, which is this. The testatrix after bequeathing legacies to objects which, as I have said, were not charitable, directed that the legacies should in the first instance be chargeable upon and payable out of the proceeds of sale of her real and leasehold estate, if any. The only real or leasehold estate which she had at the date of her will or at her death was the land at *Capetown*. Here again, without having regard to any rule of law, I must first of all construe the will. Is not that a direction that the legacies shall be payable out of the proceeds of the property at *Capetown?* It seems to me that, as a matter of construction, it is impossible to read it in any other way. It is said that she might have had real estate in *England* at her death, and that the direction only applies to real estate which she might have in *England*. How can I arrive at that conclusion?

She had not at the date of her will any real estate at all except this at *Capetown*. She was an English testatrix, and would undoubtedly look upon it as real estate. As a matter of construction, I can only arrive at the conclusion that this direction must be obeyed by applying first of all the proceeds of sale of the real and leasehold estate of the testatrix, which includes the land at *Capetown*, in payment of the particular legacies which according to this will are to be payable in the first instance out of such proceeds. It is an imperative direction, but what the consequences may be is a matter with which I have nothing to do. Then I am to apply to the will the rule of law. There is no rule of law, I am told, in the *Cape Colony* which prevents this land being disposed of in favour of charities. But that does not interfere with the construction of this will, and the true construction seems to me to be that the testatrix devotes the proceeds of this real estate at *Capetown* to the payment of certain legacies which are not charitable; and I understand that these proceeds will not be sufficient to pay the legacies in full.

Proceeding to deal with the rest of the will, I cannot, as I have said, give any meaning to the words of the last direction, except that the assets are to be marshalled, so far as possible, so as to leave the pure personal estate to be "residue" of the estate. What does "residue" mean? It means what is left after payment of debts, funeral and testamentary expenses and legacies, and when the testatrix directs that her residue shall consist of pure personal estate that involves of necessity a direction that the debts and funeral and testamentary expenses, and the legacies (so far as the proceeds of the real and leasehold estate are insufficient to pay them), shall in the first instance be paid out of the impure personal estate so as to leave the pure personal estate free for the charities.

I am referred to various authorities. They do not actually touch this case, but they come near to it and they seem to me to confirm the view which I have arrived at as to the construction of this will. The first case is *Beaumont* v. *Oliveira* (1). There the testator, after giving several legacies, gave five sums of £4000 to certain charitable institutions, and directed that all

(1) Law Rep. 4 Ch. 309.

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his charitable legacies should be paid out of his pure personalty, and bequeathed the "residue" of his property to the plaintiffs. The testator left pure personalty very much less than the amount of the charitable legacies, a larger sum of mixed personalty, and a small real estate in *Madeira*. It was held that the debts, funeral and testamentary expenses, and costs of suit ought not to be thrown upon the mixed personalty in exoneration of the pure personalty, but ought to be apportioned rateably between the two funds; that the charities should then be paid out of the residue of the pure personalty so far as it would extend, and claim for the residue against the rest of the estate, such claim abating in the proportion which the mixed personalty bore to the proceeds of sale of the *Madeira* estate. There it was held that there was no direction to marshall in favour of the charitable legatees. There was not there a gift of residue to charities, but the decision was that between the charitable legatees on the one hand, and the debts and funeral and testamentary expenses and costs of suit on the other hand, there was no direction for marshalling. However, that does not touch the case which I have to decide; because here I have to give a meaning to these words indicating that the residue is to consist of pure personal estate, which I take to be a short mode of expressing what the testatrix has expressed in other words. There are two other cases which touch the present case much more nearly. One is *Wills* v. *Bourne* (1), decided by Lord *Selborne*, sitting for the Master of the Rolls. There a testator, after bequeathing an annuity and certain legacies, devised his real estate to trustees upon trust for sale, and directed the proceeds to be applied, so far as they would extend, in payment of his debts and funeral and testamentary expenses and the annuity and legacies. He then gave his personal estate to the same trustees upon trust to convert the same into money, and out of the proceeds to pay so much of his debts and legacies as the proceeds of his real estate would not extend to pay, and to stand possessed of all the residue of his personal estate upon trust for certain charities. And then followed this direction. He declared that only such part or parts of his estate and premises should be comprised in the residue thereof, and be divided, paid,

(1) Law Rep. 16 Eq. 487.

or transferred to or among the charities, as might by law be given or bequeathed for charitable purposes. Those words are very similar to that which seems to me to be involved in the expression here used, indicating that the residue was to consist only of such part or parts of his estate as were pure personalty. The Lord Chancellor held that this amounted to a direction to marshall in favour of the charities. It is quite true that the words were more explicit than those used in this will. Then there was another case of *Miles* v. *Harrison* (1), decided by the Court of Appeal, in which *Wills* v. *Bourne* (2) was followed. There the testator gave the residue of his personal estate, which consisted of both pure and impure personalty, to trustees upon trust to sell and convert the same into money and out of the proceeds and out of his ready money to pay his debts, funeral expenses and legacies, and to pay the income to his wife for life, and after her death to raise sufficient to purchase certain life annuities. He then gave some pecuniary legacies, including a legacy of £100 to a charity school, and bequeathed all the residue of his personal estate to three charities in equal shares, and then he continued as follows: "And my will is, and I expressly direct, that the three last-mentioned legacies or bequests shall respectively be paid and satisfied out of such part of my personal estate as can lawfully be applied to the payment thereof, and which shall be reserved by my trustees or trustee for the time being for that purpose." That was as clear a direction to the trustees to make the residue consist of pure personal estate, and to reserve the pure personal estate in order to deal with it as residue, as could possibly be given. Lord *Cairns* decided that it amounted to a direction to marshall, and the Lords Justices *James* and *Mellish* were of the same opinion. But Lord Justice *Mellish* (3) said this: "I think the case is really governed by the judgment of Lord *Selborne* in the case of *Wills* v. *Bourne*, for the will in that case was substantially the same as this will would have been if there had been no direction to reserve. If the direction to the trustees had stopped at the words 'and my will is, &c. . . . . payment thereof,' then that

(1) Law Rep. 9 Ch. 316. (2) Law Rep. 16 Eq. 487.
(3) Law Rep. 9 Ch. 322, 323.

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case would have been directly in point: and the words which follow seem to me only to make the matter still stronger and clearer than they otherwise would have been." It is not necessary for me to say whether I quite agree with that or not, but it certainly was an expression of opinion on the part of a very great Judge that words such as we have in this will would be quite sufficient of themselves to amount to a direction to marshall. No authority at all has been cited to me in conflict with these except a case before Vice-Chancellor *Malins*, which was decided previously to the two last cases to which I have referred, and which, according to the reports of those cases, was not in either of them cited in argument. This is the case of *Llewellyn* v. *Rose*, and the only reference to it is in the *Weekly Notes* (1). There the testatrix, after providing for the payment of her debts, gave pecuniary legacies to the amount of £1200 to individuals, and one of £200 to the *Liverpool Infirmary*. She then bequeathed all the residue of her estate, subject to the legacies and bequests aforesaid, equally between three charitable institutions which she named, and she directed that "the several charitable bequests given by her will should be paid out of such parts of her personal estate only by law applicable to bequests of that nature." The Vice-Chancellor held that the circumstance of the bequest to charities being residuary only, rendered the direction contained in the will as to the mode of payment nugatory. That was not quite accurate according to the report, because there was one charitable bequest which was not residuary, namely, that to the *Liverpool Infirmary*. But the report is only a very short one in the *Weekly Notes*, and I cannot read that as an authority which in the least degree impugns the authority of the two cases before Lord *Selborne* and the Court of Appeal. Another case cited was *Lewis* v. *Boetefeur* (2), which was subsequent to *Wills* v. *Bourne* (3) and *Miles* v. *Harrison* (4), and in which those two cases were cited: but that case depended on the construction of the particular will, and all I need say is that that will was very different from the will which I have to construe. The only meaning which can be given to the

(1) W. N. 1869, p. 178.
(2) 38 L. T. (N.S.) 93; S. C. on app. W. N. 1879, p. 11.
(3) Law Rep. 16 Eq. 487.
(4) Ibid. 9 Ch. 316.

words in this will which direct payment of the charitable bequests out of the pure personal estate is that the pure personal estate shall be reserved as residue to answer those bequests. Accordingly upon the construction of this will, I come to the conclusion that this direction does amount to a direction to marshall for the benefit of the charities to which the residue is given, and that the legacies must be paid first of all out of the proceeds of the property at *Capetown*, so far as that will go, and the debts and funeral and testamentary expenses, including the costs of the action, and so much of the legacies as remains, must be paid out of the impure personal estate, leaving the pure personal estate, so far as possible, to constitute the ultimate residue.

Solicitors: *Ravenscroft, Hills, & Woodward; Lawrance, Baker, & Waldron; Sandilands, Humphry, & Co.; Nicholl, Manisty, & Co.*

C. C. M. D.

CHITTY, J.

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Jan. 21.

BESLEY *v.* BESLEY.

[1887 B. 2751.]

Practice—Adding Person as Plaintiff—Consent—Rules of Supreme Court, 1883, *Order* XVI., *rr.* 2, 11—*Trustee and Cestui que trust.*

The case of trustee and *cestui que trust* is not excepted from the general rule of Order XVI., rule 11, so as to enable the Court or a Judge, upon the application of a *cestui que trust* to amend by adding his trustee as co-Plaintiff in an action in respect of the trust property, to dispense with the consent in writing of the trustee.

PROCEDURE SUMMONS on application by Plaintiffs for liberty to amend their writ and the pleadings in this action by adding the name of *C. R. Besley* as co-Plaintiff. The writ in this action [1887 B. 2751] was issued on the 1st of June, 1887, and the Plaintiffs thereby claimed on the ground of breach of covenant committed in February, 1887, to recover possession from the Defendants of leasehold premises comprised in an indenture of lease of the 23rd of February, 1871, and thereby demised to them for a term of twenty-one years by *Ellen Besley* (since deceased) and *C. R. Besley*, the executors and trustees, with leasing powers, under the will of the Plaintiffs' late father. The lease contained a covenant on the part of the lessees not to assign without the previous license in writing from the lessors, with a power to lessors to determine the lease and resume possession upon breach of this covenant. It was alleged that Defendants had broken this covenant in February, 1887. *Ellen Besley* died in November, 1885, and on the 13th of May, 1887, *C. R. Besley*, as surviving trustee and executor, conveyed the reversion of the leasehold premises, and all his interest therein, to the Plaintiffs, who were beneficially interested under their father's will.

The Defendants by their statement of defence had raised the defence that the Plaintiffs at the date of the alleged breach of covenant (February, 1887) were not owners of the legal estate in the reversion.

A second action having been brought by the Plaintiffs [1887

B. 3287] for administration of the estate of their father (the testator) they obtained on the 12th of December, 1887, an order in that action that they might be at liberty to take such proceedings as they might be advised in the name of the Defendant *C. R. Besley* for obtaining possession of the premises demised by *Ellen Besley*, deceased, and *C. R. Besley* by indenture of the 23rd of February, 1871, and for rent and mesne profits in respect thereof, upon Plaintiffs giving to *C. R. Besley* a proper and sufficient indemnity against any liability for costs, such indemnity unless agreed upon to be settled by the Judge; "but this order is to be without prejudice to any right which the said *C. R. Besley* may have to object to his name being added as a co-Plaintiff in the existing action, *Besley* v. *Besley* [1887 B. 2751], if the Plaintiffs shall apply for leave to add him."

C. R. Besley had refused to give his consent in writing to be added as co-Plaintiff to the Plaintiffs' action to recover possession of the leaseholds. The Plaintiffs accordingly took out this summons for liberty to amend by adding the name of *C. R. Besley* as co-Plaintiff.

Maclean, Q.C., and *Swinfen Eady*, in support of the summons:—

We admit that for the purposes of this case rules 2 and 11 of Order XVI. must be read together, but the consent in writing required by rule 11 cannot have been intended to apply to the case of a trustee, who is bound, on receiving a proper indemnity, to protect the interests of his *cestui que trust*, which are identical with his own. No doubt a plaintiff is not entitled to compel a stranger without his consent in writing to be added as co-plaintiff on merely giving him an indemnity against costs: *Tryon* v. *National Provident Institution* (1), but that case has no application as between trustee and *cestui que trust*.

[CHITTY, J., referred to *Mason* v. *Harris* (2) and *Duckett* v. *Gover* (3).]

Romer, Q.C., and *Oswald, Stallard* and *Bremner, contrà*, were not called on.

(1) 16 Q. B. D. 678. (2) 11 Ch. D. 97.
(3) 6 Ch. D. 82.

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In an existing action the Plaintiffs apply to join a co-Plaintiff, and the person whom they propose to join will not consent. The question depends on Order XVI., rules 2 and 11. Unquestionably those two rules must be read together. In rule 11 there is an express statement that no person shall be joined as a plaintiff without his own consent in writing. I am asked to modify in some way or other those words, and dispense with the consent in writing of the proposed co-Plaintiff on the ground that he is a mere trustee for the Applicants. I am unable to do so. It is a negative clearly expressed and without any exception, and I consider that I am not at liberty to introduce an exception into the general rule of the Court on the ground that it might be convenient so to do. The observations of counsel for the Applicant might or might not have weight with those who framed the rules, but as a Judge sitting here to interpret the rule I must take it exactly as it is.

It is said that the Plaintiffs who propose to join this person have a right to use his name, he being a trustee, and that it has been decided in the administration action that they have such right. But the order in that action was made without prejudice to any right which the gentleman proposed to be added, who was the trustee, may have to object to his name being added as co-Plaintiff to this action. So that the order which was made giving the Plaintiffs liberty to use the name of the trustee was made particularly without prejudice to this question.

The argument in substance is that I ought to introduce by way of exception words which would exclude from this negative proposition the case of a trustee, where the *cestui que trust* has a right to use his name. In my opinion I cannot introduce that exception, and the conclusion I have come to, independently of the case that has been mentioned, is that I am not at liberty to depart from the express language of the order. It is said that the point now before me was not decided in *Tryon* v. *National Provident Institution* (1), because it does not appear from that case that the person proposed to be joined as co-plaintiff was a trustee for the persons who proposed to join him. I am not satisfied that

(1) 16 Q. B. D. 678.

that is a correct statement of the case. It appears to me, as well as I can make out the facts, though I am not clear on all the facts, that the person proposed to be joined did stand in the relation of trustee to the person who proposed to join him. If so, that would be an express decision on the point. But, however that may be, I decide this case as if it were new, on the express words of Order XVI., rule 11, which are sufficiently clear to enable me to dispense with authorities.

Solicitors: *Lowe & Co.; Saunders, Hawksford, Bennett & Co.; Anderson & Sons.*

F. G. A. W.

In re HOLLINGSHEAD. HOLLINGSHEAD *v.* WEBSTER.

[1886 H. 1460.]

Simple Contract Debt—Payment of Interest by Tenant for Life—Acknowledgment—Real Assets—3 & 4 Will. 4, c. 104 [Revised Ed. Statutes, vol. vii., p. 617]—Statute of Limitations (21 Jac. 1, c. 16) [Revised Ed. Statutes, vol. i., p. 705]—Part Payment—Executor—9 Geo. 4, c. 14 [Revised Ed. Statutes, vol. vi., p. 489]—19 & 20 Vict. c. 97, s. 14 [Revised Ed. Statutes, vol. xii., p. 1014].

Payment by a devisee for life of interest on a simple contract debt of his testator's is a sufficient acknowledgment to keep the right of action alive against all parties interested in remainder.

The law in regard to the payment of interest by a tenant for life on a simple contract debt stands on the same footing as that in respect of payment of interest on a specialty debt.

Roddam v. *Morley* (1) discussed and considered.

THOMAS HOLLINGSHEAD, the testator, was at the date of his will possessed of certain freehold estate at *Martin*, in the parish of *Timberland*, in the county of *Lincoln*, subject to certain mortgages thereon for £700, he was also indebted to his brother *James Hollingshead* in a sum of £400, secured by promissory note with interest at 4½ per cent.

By his will, dated September, 1870, the testator bequeathed to

(1) 1 De G. & J. 1.

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his wife, *Mary Ann Hollingshead*, absolutely, all his personal estate, subject to the payment of his debts, funeral and testamentary expenses, and devised all his real estate to his said wife, *Mary Ann Hollingshead*, for her life, subject to any mortgages or charges thereon which might be subsisting at his death, with divers remainders over in favour of his children, and appointed his said wife and *Joseph Webster* executrix and executor of his will. The testator died in April, 1871, and his will was duly proved by both the widow and *Joseph Webster*, the personal estate being sworn under £600.

The widow entered into possession of the testator's real and personal estate, and continued in such possession till her death in February, 1884. From the testator's death to her own she regularly paid to *James Hollingshead*, and afterwards to his executors, the interest on the £400, but there was no evidence from the form of the receipts or otherwise to shew whether these payments were made by her in her character of executrix or as tenant for life. *Joseph Webster* never received any portion of the assets, and beyond proving the will never took any part in the administration of the testator's estate. *Mary Ann Hollingshead* died in February, 1884, having appointed *Joseph Webster* her executor, but as her estate was insolvent he had never proved her will. In May, 1885, the mortgagees sold the freeholds at *Martin* under their power of sale, and after having satisfied their own mortgage debt and costs, paid the surplus, amounting to £397, into Court under the *Trustee Relief Act*.

In April, 1886, the executors of *James Hollingshead* commenced the present action against *Joseph Webster* and the devisees under the testator's will, claiming as creditors for £400 to have the real and personal estate of the testator administered. There was also pending a summons on behalf of the devisees for payment out to them of the fund in Court, and also another by the executors of *James Hollingshead* for payment out to them. It was admitted that the Plaintiffs in the administration action were the only creditors of the testator. It was also admitted that there was no personal estate of the testator outstanding. There was no direct evidence that the widow received any part of the testator's personal estate, but the Judge came to the conclusion that the just

inference was that she did receive some portion of it, though there was no evidence to shew how much she received or how she applied what she did receive. There was no evidence as to the testator's funeral expenses, or as to his debts, other than the £400 debt. All the summonses now came on for hearing together, but all accounts and inquiries as to these matters and generally as to the administration of the testator's estate were waived at the Bar. And upon these facts, as admitted, the only questions argued were as to the effect of the payment of interest by the widow during her life on the simple contract debt of £400, and who was entitled to the fund in Court representing the testator's real estate.

Maclean, Q.C., and *Tyssen*, for the Plaintiffs, the executors of *James Hollingshead*:—

Interest was regularly paid by the widow, who was tenant for life of the real estate as well as executrix, down to the time of her death, and such payments must be taken to be an acknowledgment sufficient to keep the right of action alive in its integrity against all parties interested in remainder: *Roddam* v. *Morley* (1); and such acknowledgment when made by a person filling the two characters of beneficial devisee and executor will be attributed to both characters and not to one only: *Fordham* v. *Wallis* (2). [They also referred to *Boatwright* v. *Boatwright* (3), and *Thorne* v. *Kerr* (4).] The effect of 3 & 4 Will. 4, c. 104, is to place simple contract creditors on the same footing in regard to real estate as specialty creditors. True, this is an action on a simple contract debt, and the authorities cited were on specialty debts, except in *Boatwright* v. *Boatwright*, but whatever the *Statute of Limitations* that is applicable, the analogy is the same, we are therefore entitled to the fund in Court representing what is left of the testator's real estate.

Farwell, for the Respondent *Webster*:—

The payments were made by the widow in her character of

(1) 1 De G. & J. 1.
(2) 10 Hare, 217.
(3) Law Rep. 17 Eq. 71.
(4) 2 K. & J. 54.

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executrix only. Payment by one executor will not take the case out of the *Statute of Limitations* as against another executor: *Scholey* v. *Walton* (1); neither a mere acknowledgment of the debt by all the executors, nor an express promise by one of them, will take the case out of the *Statute of Limitations*, there must be an express promise by all: *Tullock* v. *Dunn* (2); *Atkins* v. *Tredgold* (3). The payment of interest by one executor affects him only and does not in any way affect the co-executor: such a payment involves the executor who makes it in a personal liability to pay the debt, and the result of the *Mercantile Law Amendment Act*, 1856, s. 14 (19 & 20 Vict. c. 97), is that after the lapse of six years from the testator's death not only is the co-executor absolved but the testator's personal estate is exempted from all liability to pay the debt, and the creditor's only remedy is against the executor personally who made the payment. [*Brocklehurst* v. *Jessop* (4); *Winter* v. *Innes* (5); *Wainman* v. *Kynman* (6); *Tippets* v. *Heane* (7), and *Lord Tenterden's Act*, 9 Geo. 4, c. 14, were referred to.] The right against *Webster* on a *devastavit* is also barred: *In re Gale* (8).

Swinfen Eady, for the devisees:—

The action was not commenced within six years from the testator's death, and is therefore barred. We are not affected by the payments made by the tenant for life. The admission of a debt by an executrix will not take it out of the statute so as to enable a creditor to obtain payment out of the testator's real estate: *Putnam* v. *Bates* (9). [He also adopted the previous argument on the question whether the debt was barred by 21 Jac. 1, c. 16.]

Francis Webb, for some of the legatees, adopted the previous arguments.

Maclean, in reply.

(1) 12 M. & W. 510.
(2) Ry. & M. 416.
(3) 2 B. & C. 23.
(4) 7 Sim. 438.
(5) 4 My. & Cr. 101.
(6) 1 Ex. 118.
(7) 1 C. M. & R. 252.
(8) 22 Ch. D. 820.
(9) 3 Russ. 188.

Jan. 30. CHITTY, J. (after stating the facts and admissions as set out above, continued) :—

The first question which arises is in what character the widow paid the interest. The receipts taken are silent on the subject. It was argued for the Defendants that she paid in her own right. But this is untenable. She was under no personal liability. She made the first payment on the 20th of April, 1871, about a fortnight after the testator's death. It was then argued for the Defendants that she made the payments in her character of executrix only. But I think the just inference is that she made the payments in her character of tenant for life of the real estate as well as in her character of executrix. She paid the interest because she was in possession of assets of the testator: there is no sufficient reason for attributing the payments to her character of executrix only. On the contrary, the case on the facts is, if anything, stronger for saying that she paid in her character of tenant for life of the real estate of which she was in possession, and which has proved more than sufficient for payment of the mortgage debt; whereas it is not shewn that she was in possession of personal estate applicable to the payment of the interest. In *Fordham* v. *Wallis* (1) Sir *George Turner*, upon facts similar to the present, considered that the payments ought to be attributed to both characters.

The last payment of interest was made by the widow in September, 1883, and the present proceedings by the executors of the creditors were commenced within six years after the last payment. The Defendants, the persons entitled to the testator's real estate in remainder after the widow's death, set up the *Statute of Limitations* (21 Jac. 1, c. 16) as a bar to the claim, and contend that the proceedings ought to have been commenced within six years after the testator's death, and that they are not affected by the payments of interest made by the tenant for life. The question then which arises is as to the effect against the remaindermen of payment by a tenant for life of interest on a simple contract debt carrying interest.

Strange to say, the point does not appear to have been decided. *Roddam* v. *Morley* (2) was the case of a debt on a specialty by

(1) 10 Hare, 217. (2) 1 De G. & J. 1.

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which the testator's heirs were bound. There it was decided by Lord *Cranworth*, with the assistance of two common law Judges, that the effect of payment of interest on the specialty by the tenant for life, was to keep the debt alive and set the action free as against the remainderman. This decision is not a conclusive authority in favour of the Plaintiffs, because the exact point there decided turned upon different statutes from those which apply to the present case. But the general observations of the Lord Chancellor, and the course of reasoning pursued in his judgment, had an important bearing on the question before me.

The statutes which apply to the present case are the statute 3 & 4 Wm. 4, c. 104, and the *Statute of Limitations* of 21 Jac. 1, c. 16: the arguments at the bar extended also to *Lord Tenterden's Act* (9 Geo. 4, c. 14), and the *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97, s. 14).

The statute of 3 & 4 Wm. 4, c. 104, enacts that where (as in the present case) there is no charge of debts, the real estate of a deceased debtor shall be assets to be administered in Courts of Equity for the payment of the just debts of such persons, "as well debts due on simple contract as on specialty," and that "the devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty," as the heirs or devisees of any person dying seised of freehold estates were before the passing of the Act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound. The Act contains a proviso giving a priority to specialty creditors, which has since been abolished by statute. The general effect of the Act is plainly to place the simple contract creditors and specialty creditors on the same footing in regard to the real estate of the debtor, save that the specialty creditors had a priority.

It was suggested rather than argued for the Plaintiffs that the effect of this statute of *William* IV. was, with the exception only of the priority in the proviso, to place simple contract creditors on the same footing in regard to real estate as specialty creditors, so as to confer on simple contract creditors the benefit of the

same *Statute of Limitations* as those which relate to specialties. It is enough to say that the suggestion cannot be maintained.

The *Statute of Limitations*, then, which applies to the present case is that of 21 Jac. 1, c. 16. As is well known, that statute required the action for recovery of a simple contract debt to be brought within six years "next after the cause of action." It contained no provision as to acknowledgment or part payment of principal or payment of interest. But there has been grafted on this statute a series of judicial decisions as to the effect of acknowledgments and payments to take the case out of the statute. Under those decisions part payment of principal and payment of interest stand upon the same footing. Payment of interest is regarded as an acknowledgment of the debt, and from the acknowledgment a promise to pay the debt may and ought to be implied, as appears from the judgment of Lord *Tenterden* in *Tanner* v. *Smart* (1) and of Sir *George Turner* in *Fordham* v. *Wallis* (2). That was one way of stating the result of the decision on acknowledgments or part payments. Another was that the acknowledgment was sufficient evidence of a new or continuing contract. *Lord Tenterden's Act* (3) required that the simple acknowledgment should be in writing; it dealt only with simple acknowledgment by words as distinguished from the acknowledgment of the debt by part payment of principal or payment of interest, and it expressly excepted such payments from its operation. The *Mercantile Law Amendment Act*, 1856, dealt with part payment of principal and payment of interest, but only with regard to contractors and executors or administrators. The short effect of the enactment as to executors is that no executor shall "lose the benefit of" the statute of *James* "so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other executor" (4). The *Mercantile Law Amendment Act* and *Lord Tenterden's Act* are both silent on the subject of any such payment made by a tenant for life of the real estate of a deceased debtor, and these Acts therefore have no direct bearing on the question to be decided.

An elaborate argument was delivered at the bar as to the effect

(1) 6 B. & C. 603, 609.
(2) 10 Hare, 225.
(3) 9 Geo. 4, c. 14, s. 1.
(4) 19 & 20 Vict. c. 97, s. 14.

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of payment of interest on a simple contract debt by one only of two executors in regard to the other executor and the testator's personal estate. But as no relief is asked against *Webster*, the surviving executor, and as all administration accounts or inquiries of any kind in reference to the testator's personal estate are waived at the bar, it is not necessary to decide any question as to the effect of the payments by the widow as executrix, either in regard to *Webster* or the testator's personal estate. The only ground for entertaining the general arguments on these points is the bearing they may have in ascertaining the effect of the widow's payments in her character of tenant for life. I will briefly state the nature of these arguments. It was said that the payment of interest by one executor affected him only and did not in any way affect his co-executor, and the argument was pushed to the extreme length of saying that the payment involved the executor who made it in a personal liability to pay the debt. Therefore it was urged that where one of two executors, having assets in his hand, applies those assets, so far as they extend, in payment of interest on a simple contract debt, the result is that after the lapse of six years from the testator's death not only is the co-executor absolved, but the testator's personal estate, whether in the hands of the co-executor or outstanding, is exempted from all liability to pay the debt, and that the creditor's sole remedy is against the executor personally who made the payment. This argument was founded on the language of the 14th section of the *Mercantile Law Amendment Act.* But it appears to me that full effect may be given to every word in that enactment without producing so extraordinary a result. Some reasonable interpretation may be put on the words "so as to be chargeable" which would stop short of such a conclusion; as, for instance, by holding that the co-executor who has not paid is not to be personally chargeable as for a *devastavit* in paying over to beneficiaries assets which have come to his hands. But I dissent altogether from the proposition that the executor by whom the payment is made is thereby involved in any personal liability. The promise to pay the debt arising from the payment of interest, whether such promise is an inference of fact or an implication of law, is a promise to pay as executor, that is, out of the personal assets of the

testator. The inference or implication must be consistent with the facts from which it is drawn or raised, and it would be wholly inconsistent with the facts to hold that in such a case as that supposed the executor has incurred any personal liability. But it is unnecessary to pursue these matters any further.

In the case before me the Plaintiffs are suing on a legal demand or debt for a remedy which can be granted only by a Court of Equity, and for a remedy against property of the deceased debtor which can be reached only by a Court of Equity. The statute of *William* IV. already cited does not confer on the simple contract creditor any right at law against the real estate of the deceased debtor, but makes such real estate assets to be administered in Courts of Equity, and confers a remedy by suits in equity only. In regard to demands to which the statute of *James* applies, Courts of Equity undoubtedly follow the law. But there have not been, and, indeed, there cannot be, any decisions in a Court of Law as to the effect of payment of interest on a simple contract debt by a tenant for life of real estate. In determining this question, a Court of Equity ought to follow the analogy of the decisions at law, so far as they are applicable, in relation to acknowledgment and part payment of principal or payment of interest, but there are equitable considerations also which must be carefully attended to. Now what is the duty and what are the powers of a tenant for life in possession of real assets of a deceased testator? His duty, as was pointed out by Lord *Cranworth* in *Roddam* v. *Morley* (1), is to keep down the interest on the debt and nothing more. He has no power to sell the real estate in order to pay the debt. By discharging his duty in paying the interest he relieves the remaindermen from the burden of interest. It would be absurdly unjust to hold that from the performance of this duty a personal promise on his part to pay the debt ought to be inferred; I reject this argument on the part of the Defendants. The right principle to adopt is, that so far as the real estate is concerned there is no one else but the tenant for life to pay the interest; that in making such payment he represents the whole estate; that the payment is an admission of the

(1) 1 De G. & J. 1.

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liability to the debt affecting the real estate of which he is in possession: it is sufficient evidence of a continuance of the testator's contract to pay the debt, or (if it be necessary to have recourse to the somewhat subtle doctrine of a promise to pay) it is a promise to pay out of such real estate, which he, as the person in possession of such real asset, is competent to give on behalf of the real assets generally, and so as to bind those who take in remainder. This places the law in regard to the payment of interest on a simple contract by a tenant for life on the same footing as payment of interest on a specialty debt. The decision in *Roddam* v. *Morley* (1) turned principally on the 5th section of the 3 & 4 Will. 4, c. 42. That section says nothing about the effect of payment of interest by a tenant for life: but in dealing with the enactment and in arriving at the conclusion that the effect was to keep alive the debt as against the remaindermen, Lord *Cranworth* founded his judgment to a considerable extent on a consideration of the position and duty of a tenant for life. In *Coope* v. *Cresswell* (2) Lord *Chelmsford* stated that he was unable to concur in the reasoning which led to the ultimate decision in *Roddam* v. *Morley*. I apprehend it was not competent for him to overrule the decision in *Roddam* v. *Morley*, nor, indeed, does he purport so to do. But while not concurring with the reasoning in *Roddam* v. *Morley*, he adds that it was unnecessary for him to consider whether the parties, tenant for life and remaindermen, are not so united in interest that payment by the one might not be regarded as an acknowledgment of the debt by the other; and he adds that it would undoubtedly have been the case if the bond debt had been a charge upon the land. Upon this I may observe that neither in *Roddam* v. *Morley* nor in the case before me was or is the debt a charge upon the land; a debt on specialty in which the heirs are bound, does not create either at law or in equity a charge; the land is merely assets in the hands of the heir or devisee for payment of the specialty debt, just as the land is, since the passing of the 3 & 4 Will. 4, c. 104, assets for payment of the simple contract debt. In this respect the case before me stands on the same footing as *Roddam* v. *Morley*. In my opinion,

(1) 1 De G. & J. 1. (2) Law Rep. 2 Ch. 112, 126.

the observations of Lord *Chelmsford* have not weakened the effect of the course of reasoning adopted by Lord *Cranworth* so far as it bears upon the question which I have to decide.

The only other authority which requires any distinct notice on this point is *Fordham* v. *Wallis* (1) already mentioned, which was decided before *Roddam* v. *Morley* (2). The Defendants on an examination of the terms of the decree claimed this case as an authority in their favour. But whatever may have crept into the decree it is clear that Sir *George Turner* did not intend to decide the question whether payment of interest by a tenant for life would keep alive the debt against the fee; he states expressly in his judgment that he abstained from giving any judgment on that point.

The result is that the Plaintiffs are entitled to have the £397 applied in payment of their debt.

Solicitors: *Scott & Co.*, agents for *Rodgers & Jessopp, Sleaford; Paterson, Snow, Bloxam & Kinder; Page & Scorer; Swann & Co.*

G. M.

POLLOCK *v.* LANDS IMPROVEMENT COMPANY.

[1887 P. 613.]

Statute—Construction—Repeal by Implication.

The *General Land Drainage and Improvement Company's Act*, 1849, and the *Lands Improvement Company's Act*, 1853, each contained a section which provided that, upon the final order or certificate of the Inclosure Commissioners and the execution of the improvements, the company should have a first charge upon the inheritance of the improved lands in priority over every other then existing or future charge. The company of 1853 having executed improvements of land already subject to a charge in favour of the company of 1849, contended that the latter charge was displaced by theirs:—

Held, that the two sections were not irreconcilable, and that the charge which was first in order of time was entitled to priority.

THE Plaintiffs in this action were *George Frederick Pollock* and others, the trustees of the *London Life Association*, as assignees from the *Land Drainage Company*, and the Defendants were the

(1) 10 Hare, 217. (2) 1 De G. & J. 1.

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Lands Improvement Company, the Rev. *William Drake*, the Bishop of *Lincoln*, and *John Swan*.

The question was as to the relative priorities of a charge created under the *General Land Drainage and Improvement Company's Act*, 1849, which was vested in the Plaintiffs, and another charge subsequently created in the same property under the *Lands Improvement Company's Acts*, 1853, 1855, and 1859.

The property charged was insufficient for the payment of both charges.

By the Act of 1849 the *General Land Drainage and Improvement Company* was incorporated for the purpose of executing works for the improvement of lands and undertaking and assisting the execution of such improvements and other purposes. The Act contained provisions enabling any person interested as therein mentioned in land, and therein referred to as a landowner, to enter into a provisional contract with the company for the improvement by the company of the land in which he was interested and the execution by the company of works for such improvement, and providing for such provisional contract after the sanction thereof by the Inclosure Commissioners for *England* and *Wales* becoming an absolute contract, and enabling the Commissioners by provisional order under their seal to declare that it was right and proper and for the benefit of the parties having any estate or interest in the lands to be improved that the moneys paid and to be paid for the execution of the improvements, and for costs, charges, and expenses, or part of such moneys, should be charged upon the inheritance of such lands or a sufficient part thereof.

By the 62nd section of the same Act it was enacted, "That from and after the time when the inheritance of any land is in pursuance of this Act declared to be charged with any money the company shall be entitled to and shall have from the date of the absolute order a lien and charge upon such lands for the money by the absolute order declared to be charged, with such interest as is contracted for, or, if there be not any contract as to the interest, with lawful interest thereon, and such lands shall thenceforth be and continue liable to the payment of such money and interest, and such lien and charge shall have priority over

every other then existing and future charge and incumbrance whatsoever upon or affecting such lands, except quit rents or chief rents incident to tenure and tithe commutation rent-charges, and any charges created or to be created under any Act authorizing advances of public money for drainage, respectively, if any: Provided always, that every such charge shall be redeemable on payment of all principal money, interest, and costs: Provided also, that in any case in which a part only of the land charged is subject to a mortgage or other incumbrances the lien and charge shall have such priority over the mortgage or other incumbrances only to the extent of a due proportion (to be by the circumstances ascertained and apportioned as by this Act provided) of such lien and charge."

The Defendant company was incorporated by the *Lands Improvement Company's Act*, 1853, which Act was amended by an Act of 1855, and again by an Act of 1859. By the last-mentioned Act it was provided that the Acts of 1853, 1855, and 1859 should be read together as one Act, and might be cited together as the *Lands Improvement Company's Acts.*

The *Lands Improvement Company's Acts* contained (among others) provisions enabling any landowner (which expression was thereby defined to mean such person or persons in the actual possession or the receipt of the rents and profits of lands as therein mentioned) to enter into a provisional contract with the company for the execution by the company or by such landowner, by means of money to be advanced by the company, of improvements on any land in which he was interested, and with the assent of the Inclosure Commissioners for *England* and *Wales* for charging the money or contract sum for which the company should agree to execute such improvements, or the money to be advanced by the company, as an improvement loan on such lands, and providing for such provisional contract after the sanction thereof by the Inclosure Commissioners becoming an absolute contract, and when the sanction of the Commissioners should be given to any such improvements for the execution by them and delivery to the company of a provisional order.

By sect. 51 of the Act of 1853 it was provided that "when the inheritance or fee of any land is in pursuance of this Act charged

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with any money, the company shall be entitled to and shall have from the time from which such rent-charge shall commence and take effect a charge upon such lands for the money ascertained and approved by the Commissioners as aforesaid, with such interest as contracted for, not exceeding £5 per cent. per annum, or, if there be not any contract as to the interest thereon, at the rate of £5 per cent. per annum, and such lands shall thenceforth be and continue liable to the payment of such charge, and such charge shall have priority over every other then existing and future charge and incumbrance whatsoever upon or affecting such lands, except quit rents, chief rents, feu duties, ground annuals, and other charges incident to tenure, and tithe commutation rent-charges created or to be created under any Act authorizing advances of public money for drainage, respectively, if any."

By an absolute order under the seal of the Inclosure Commissioners, dated the 29th of March, 1860, the Commissioners, in pursuance of the *General Land Drainage and Improvement Company's Act*, 1849, declared and absolutely ordered that the inheritance of the lands mentioned in the schedule to the order, being the *East Allington* glebe lands, was absolutely charged with the sum of £1362 2*s.* 8*d.* paid for certain improvements mentioned in the schedule, and that such charge was a rent-charge of £84 19*s.* 9*d.* to be paid by equal half-yearly payments as therein mentioned for the period of thirty-one years from the date of the order.

By an absolute order under the hands and seal of the said Commissioners, dated the 15th of April, 1875, the Commissioners in pursuance of the *Lands Improvement Company's Acts* charged the inheritance, or fee of the same glebe lands, with the payment to the Defendant company, their successors and assigns, of the yearly sum of £48 18*s.* 10*d.*, payable half-yearly as therein mentioned, for the term of twenty-five years from the 25th of March, 1875.

The statement of claim stated that the above-mentioned rent-charges were both in arrear; that the Defendant *Drake* was the rector of *East Allington* and entitled to the rents and profits of the glebe lands, subject to the said rent-charges; that in the year 1885 divers judgments were recovered against the Defendant

Drake, and writs of sequestration issued to levy the amounts recovered by such judgments; and that the Defendant *Swan*, as sequestrator, was in receipt of the rents and profits of the glebe lands and had in his hands a considerable sum representing such rents and profits.

The Plaintiffs claimed to have the respective priorities, rights, and interests of the Plaintiffs and the Defendant company in respect of the two rent-charges of £84 19*s.* 9*d.* and £48 18*s.* 10*d.* respectively determined, and a declaration that the rent-charge of £84 19*s.* 9*d.* had priority over the rent-charge of £48 18*s.* 10*d.*

Romer, Q.C., and *Christopher James*, for the Plaintiffs:—

Unless the 62nd section of the Act of 1849 is by necessary implication repealed by the 51st section of the Act of 1853, our charge being first in point of time must necessarily prevail.

[They referred to *Ex parte Chick* (1); *Hawkins* v. *Gathercole* (2); *Trustees of Birkenhead Docks* v. *Laird* (3); *Maxwell* on Interpretation of Statutes (4).]

Maclean, Q.C., and *Hornell*, for the Defendant company:—

The 51st section of the Act of 1853, must necessarily be construed as repealing the 62nd section of the Act of 1849, so as to enable the company to hold its statutory charge as a first charge on the land affected, although such charge was in order of time subsequent to the statutory charge under the Act of 1849.

[They referred to *Green* v. *Reg.* (5); *Wake* v. *Mayor of Sheffield* (6); *Baroness Wenlock* v. *River Dee Company* (7).]

Byrne, for the Bishop of *Lincoln* and the Defendant *Swan*.

Romer, in reply.

CHITTY, J. (after disposing of a matter not referred to in this report, continued):—

The point which I have to decide is presented in such a form as to amount to what I may call a solemn legal conundrum. It

(1) 11 Ch. D. 731.
(2) 6 D. M. & G. 1.
(3) 4 Ibid. 732.
(4) 2nd Ed. p. 222.
(5) 1 App. Cas. 513.
(6) 12 Q. B. D. 142.
(7) 36 Ch. D. 674.

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is said that each company has a clause in its Act of Parliament enacting that any charge obtained under its own Act of Parliament shall have priority over every other charge, whether existing at the time or made afterwards. On looking at the two statutes, that does appear to me to be the case.

The statute under which the Plaintiffs claim is the first, and the object of that Act may be shortly stated as being to incorporate a company for the purpose of improving lands, making advances, entering into contracts, and the like, with a view, no doubt, to encourage the improvement of land. It was thought right to give a special privilege to the first company, that is, the privilege which is enacted in sect. 62—the charge is to have priority (following the language of the section) over every other then existing and future charge or incumbrance whatsoever, with certain exceptions. With scarcely a verbal difference, a similar section is contained in the Defendants' Act of Parliament, which is also an Act of Parliament for the same purpose, that is to say, an Act of Parliament for incorporating another company to do the same thing for the same purpose as the first company was incorporated to do. The Legislature evidently thought that this was a matter in which they might well incorporate these two companies for the same purpose—there may be more, for aught I know—and probably thought that they should not give a monopoly to one company over the other.

It is said that the two enactments are irreconcileable, and that therefore the second must repeal the first. I propose to examine that proposition a little. Are the two enactments irreconcileable? I think not. It is not like the case of the Legislature enacting in one private Act that *Blackacre* (to take the old form of illustration) shall be subject to a charge in favour of *A.* in priority to every charge now existing on the land, and to any future charge; and then enacting, without notice of the statute in favour of *A.*, that *B.* shall, as regards *Blackacre*, have a charge in respect of a certain sum of money lent by him on the land in priority to every existing charge and every future charge. It is not that case, because that is a case of such particularity that I do not think it would be possible by any reasonable ingenuity to say that the two clauses could stand. I say this is not that case,

because in the present case the two statutes contain general powers enabling each company to make the advances or to execute the powers which no doubt the company will execute, although they are not bound to execute, and powers, moreover, which do not relate to any specific land. They are general powers travelling over the whole range of the land which is included in the scope of the Act.

Then I agree that they are not two particular and special enactments; but that they are in the nature of two general enactments. All that the Legislature says is, that if you do that which you are not bound to do—if you execute these powers, you shall then have, as the result, a priority.

But then I come to try the question a little more narrowly on the facts, to see whether it is not right and reasonable, on grounds of common sense, to allow these two enactments to stand side by side as not being inconsistent. The first company executed the first work, and when they had done that, what was their position? They had according to their statute a charge which was prior to every existing charge and every future charge. I leave out the exceptions as only encumbering the case. Is there anything in the second statute sufficient to take away that which had been conferred by the effect of the first, not given of course until the first company had executed the power which was given to them. The second Act, no doubt, was in operation at that time, and that is really all that can be said against the statutable priority which is given to the first company. When the second company, who may leave these things alone, come to execute their power, why should I construe their Act of Parliament so as to disturb the priority which already exists under the first, and which has been gained by it? It is a matter of construction. I think the right way is to read them both standing side by side, so that each company may execute its own power and get the priority. But the one which has once got a priority where the two enactments are to be read together, maintains that priority, and it is not to be disturbed by the other company under a similar power doing a similar thing. There is another point which is worth considering, and one which may occur as shewing that the construction I have put upon the section is a

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reasonable one. One of these companies first executes certain improvements, and then certain other improvements, and obtains in succession two distinct orders, from the Inclosure Commissioners. It is impossible that those two can rank each as prior to the other. One must have some priority. As long, of course, as they are in the hands of the company itself it is an immaterial matter. But these Acts of Parliament provide in special terms for the assignment of charges, and supposing that the company that had got two such orders and two such charges assigned one, and assigned it in such a manner as that it could not be said that it had given to its assignee priority; what would be the result? According to one view there would be a deadlock and each would have priority over the other. That is absurd. I think in dealing with such a case as that, the right thing would be to say—whether the company had assigned the first or the second, there being nothing, as I say, in the assignment to shew priority by contract on the part of the assigning company—that this is a case not within the Act. It is a case in which priority is given over other charges, but as between those two charges it is not given. The only right way is to treat the charges in the order of date as settling the order of priority. That is a similar case to the one with which I have to deal, and I think the proper effect may be given to both these enactments in the way I have indicated. It is not necessary to go through the cases cited, because the point is, whether I can reconcile these two enactments. I have reconciled them to my satisfaction, and have come to the conclusion which I think the justice of the case requires, and I have answered this supposed difficulty to the best of my ability.

The form of order which I make is this; first, a declaration in accordance with my judgment of the priority of the Plaintiffs' rent-charge over the Defendants' rent-charge. Then there must be a reference to Chambers for the appointment of a receiver, and an order upon the Defendant *Swan* to pay over the balance in his hands to the receiver; and then an account of what is due to the Plaintiffs for arrears of their rent-charge.

With regard to the costs, this being a question of priority, the usual rule in a case of this sort, where it is a mere question of priority, is for each party to add his costs to his security.

The Plaintiffs will therefore add their costs to their security. Then there will be liberty to apply as to raising the amount found due to the Plaintiffs by sale or mortgage of the lands.

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Solicitors: *Druces & Attlee; West & Co.; Paterson, Snow, Bloxam, & Kinder.*

G. M.

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Feb. 3.

[1888 H. 440.]

Companies Clauses Act, 1845, ss. 45, 63 [*Revised Ed. Statutes, vol. ix., pp.* 572, 576]—*Companies Clauses Act*, 1863, *s.* 28 [*Revised Ed. Statutes, vol. xiv., p.* 770]—*Inspection of Registers of Company—Injunction.*

The right given to holders of stock and debentures by the *Companies Clauses Act*, 1845, ss. 45, 63, and by the *Companies Clauses Act*, 1863, s. 28, of inspecting the registers of a company, is not confined to an inspection of the names and addresses only of the holders of stock and debentures, may be exercised without assigning any reason for requiring inspection, and can be enforced by an injunction restraining interference by the company with the stockholder in the exercise at all reasonable times of his statutory right, without his being compelled to apply for a mandamus calling upon the directors to allow inspection.

MOTION for an injunction to restrain the Defendants, the directors and the *Crystal Palace Company*, from interfering with or impeding the Plaintiff in the exercise of his statutory right as a shareholder and debenture-holder to inspect and take copies from the register of holders of consolidated stock of the Defendant company, and from withholding such register from the Plaintiff's inspection, or making the same inaccessible to the Plaintiff for the purpose of his statutory rights. The motion also sought to restrain the directors from sending out stamped forms of proxies, but, upon an undertaking being given, this part of the case was not the subject of argument or decision.

The Plaintiff was the holder of £6000 consolidated A stock and also of £16,000 debenture stock of the *Crystal Palace Company*, and had applied personally and by letter for permission to inspect the register of the proprietors of consolidated A stock in the company, and to take copies or extracts therefrom. The

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Defendants had consented to allow the Plaintiff to inspect the register so far as it related to his own name and address and the amount of his holding, and to the names and addresses of the other shareholders, but not to see any one's holding but his own.

The action was brought, and the Plaintiff now moved, to restrain the directors from interfering with him in the exercise of his statutory right.

Romer, Q.C., and *W. Phipson Beale*, in support of the motion, referred to the *Companies Clauses Act*, 1845, ss. 45, 63, which provide for keeping a register of mortgages and bonds and the names of the parties thereto, and a register of the holders of consolidated stock, which registers are to be accessible to and may be perused by the holders of shares or stock in the undertaking at all reasonable times; and to the similar provision as to debenture stock contained in the *Companies Clauses Act*, 1863, s. 28.

Whitehorne, Q.C., and *Rowden*, for the Defendants, *contrà*:—

A party applying for an inspection of the books and registers of a company must, in order to obtain it, shew some reasonable grounds, and satisfy the Court as to his object in making the application, which may be merely inquisitive and not for any *boná fide* purpose: *Rex* v. *Wilts and Berks Canal Navigation* (1). Where, as is here alleged, a company or public body fail to perform duties imposed upon them by statute, the remedy is by mandamus and not by action for an injunction: *Reg.* v. *Derbyshire, Staffordshire, and Worcestershire Junction Railway* (2); *Glossop* v. *Heston and Isleworth Local Board* (3). And as before the *Judicature Act* the remedy would clearly have been by mandamus, no new power is given by the *Judicature Act*, 1873, s. 25 (8), to the Chancery Division to issue an injunction, where it could not before have been granted, and where the complete remedy by mandamus in the Queen's Bench Division would have been an answer to any such application: *North London Railway Company* v. *Great Northern Railway Company* (4); *Lowndes* v. *Bettle* (5).

(1) 3 Ad. & E. 477.
(2) 3 E. & B. 784.
(3) 12 Ch. D. 102.
(4) 11 Q. B. D. 30.
(5) 12 W. R. 399.

[CHITTY, J., referred to *Aslatt* v. *Corporation of Southampton* (1)].

That decision was not approved by Lord *Esher*, M.R., in the subsequent case of *North London Railway Company* v. *Great Northern Railway Company* (2), and there is no right, we submit, to translate the positive order which is made by mandamus into the negative order of an injunction.

Romer, in reply.

CHITTY, J.:—

The Plaintiff is a holder of stock in the *Crystal Palace Company* and he has applied for leave to inspect the register of stockholders. It is admitted that the effect of the evidence is that the company, through the directors, have refused to allow inspection. Thereupon the Plaintiff moves for an injunction, and the first point raised on behalf of the company and the directors is that the stockholder has never stated the reasons or grounds upon which he asks to see the books, and that unless those reasons are stated the company are entitled to refuse. They refused point blank to allow inspection, and did not raise any such subsidiary question as that raised at the Bar. They did not say: "If we think you are applying on reasonable grounds we will allow the inspection," but they said "We will not allow it at all;" that is to say, up to a certain point only and then it must stop—"the Plaintiff may see the entry in regard to his own stock, he may see his own name and address and the amount of stock he then appears to hold, and he may see the names and addresses of the other stockholders; but he will not be allowed to see—and this amounts to an absolute refusal—the amounts which are held by the other stockholders."

Now sect. 45 of the *Companies Act*, 1845, runs thus:—[His Lordship read the section]. In this case it is stock. There is such a book kept by the company, and that book does contain the entries which the statute requires. There is nothing in the section at all requiring the share or stockholder to state the

(1) 16 Ch. D. 143. (2) 11 Q. B. D. 30.

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grounds of his application; all that it says is that it shall be accessible to him without any other qualification than "at all reasonable times. If a stockholder asked to see that book at a time which was not reasonable, then the company, of course, would be entitled to refuse to comply for the time being with his application. But there is not a word to be found in the section as to reasonable grounds, and I decline to construe the section by putting in such words. It seems to me that would be an erroneous construction of the section. The argument for the defendant company was founded upon some observations which fell from the Judges of the Court of Queen's Bench in deciding a question which arose in *Rex* v. *Wilts and Berks Canal Navigation* (1). There, the question being one of fact—whether there had been a refusal—it was held and decided that there had been no refusal. In considering the question whether there had been a refusal some observations undoubtedly fell from the Judges to the effect that when a demand is made the person to whom it is made should be informed *bonâ fide* of the object of that request, but I am satisfied that though there are observations of that kind, which I shall not criticise one way or the other, but will accept loyally with reference to the point of fact whether there had been a refusal or not, it was not intended by the Judges, and could not have been intended, to import into the statute (which contains words very similar to those in the one before me) something to prevent inspection which was not to be found in the statute. The right, then, is to have access to the book, and the directors of the company are wrong in saying that Plaintiff shall have access to part only of the book when the right of access is not so limited by the statute.

Then it was contended that the remedy in this case was by mandamus, and *Glossop* v. *Heston and Isleworth Local Board* (2), which deals with the subject of prerogative mandamus, was cited. This, however, is not a case in which the writ of prerogative mandamus would apply, but simply the case of a private owner of stock with a statutory right to see the books, and of an interference by the Defendants with that statutory right. It seems

(1) 3 Ad. & E. 477. (2) 12 Ch. D. 102.

to me to follow that when the statutory right of an individual is interfered with an injunction would have been granted by the old Court of Chancery, and at any rate ought now to be granted by the High Court. I therefore grant the injunction as asked, but the words "at all reasonable times" must be inserted in the order.

Solicitors: *Sydney Morse; H. Kimber, Elliott, & Co.*

F. G. A. W.

NORTH, J.
1888
Jan. 16.

In re KERSHAW.
DRAKE *v.* KERSHAW.

[1887 K. 465.]

Will—Construction—Bequest of Leasehold House—Contract by Testator to purchase Leasehold Reversion—Liability of Legatee to pay Purchase-money—Locke King's Act (17 & 18 *Vict. c.* 113) [*Revised Ed. Statutes, vol. xii., p.* 387]—40 & 41 *Vict. c.* 34, *s.* 1 [*Revised Ed. Statutes, vol. xviii., p.* 384].

By virtue of sect. 1 of the Act 40 & 41 Vict. c. 34, Locke King's Act now extends to leaseholds.

ORIGINATING SUMMONS by the executors and trustees of the will and a codicil of *J. H. Kershaw*, raising certain questions with reference to his estate.

The Defendant was the widow of the testator, and also his executrix.

The testator, by his will, dated the 19th of November, 1884, gave to his wife "the leasehold house in which I now reside, provided she shall elect to accept the same, and declares such option to her co-executors within three months after my decease." At the date of the will the testator was residing in a house, No. 14, *Porchester Square, Paddington*, which he held under a lease dated the 20th of April, 1870, for a term of seventeen years from the 25th of March, 1870. On the 17th of April, 1885, he surrendered this lease to his lessor, and on the 18th of April, 1885, the lessor granted him a new lease of the house for a term of seventeen years from the 25th of March, 1885. On the 21st of February, 1887, the testator, through his solicitors, made an offer by letter to his lessor to purchase the head lease under which the lessor held the house for the sum of £2050. This offer was accepted by letter on the 23rd of February, by the lessor's solicitors on his behalf, but no formal contract was entered into. On the 3rd of March, 1887, the testator died. The purchase had not been completed. After his death his executors were advised that the letters constituted a contract binding on the testator, and they completed the purchase, paying the purchase-money out of the testator's estate.

One of the questions asked by the summons was, what interest passed to the widow under the bequest to her of the leasehold house in which the testator resided, and, in particular, whether she was entitled to the leasehold interest which belonged to the testator at the date of his will under the under-lease, without performing the contract subsequently entered into by him for the purchase of the reversionary leasehold interest, or whether she was entitled to have such contract carried out at the expense of the testator's estate for her benefit.

W. Phipson Beale, for the Plaintiffs:—

The Defendant cannot take the house without completing the contract for the purchase of the reversion, and paying the purchase-money out of her own moneys. The unpaid purchase-money is a charge on the property, which the legatee is, by virtue of *Locke King's Act*, and the Acts amending it (17 & 18 Vict. c. 113, 30 & 31 Vict. c. 69, 40 & 41 Vict. c. 34), bound to satisfy: *In re Cockcroft* (1). That decision related to real estate, but the effect of sect. 1 (2) of the Act 40 & 41 Vict, c. 34, is to extend *Locke King's Act* to leaseholds.

(1) 24 Ch. D. 94.

(2) 17 & 18 Vict. c. 113, s. 1: "When any person shall, after the 31st day of December, 1854, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof."

The Act 30 & 31 Vict. c. 69, which was passed to remove doubts which might exist as to the construction of the former Act, after a recital of that Act, provides, by sect. 1, that "in the construction of the will of any person who may die after the 31st of December, 1867, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary or other intention shall be further declared by words expressly or by

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Everitt, Q.C., and *Carson*, for the widow:—

It was decided in *Solomon* v. *Solomon* (1) and *In re Wormsley's Estate* (2) that *Locke King's Act* did not apply to leaseholds. The language of the amending Act, 40 & 41 Vict. c. 34, is not sufficient to alter this rule. The object of that Act was only to extend the former Act to the case of a person dying intestate.

NORTH, J.:—

In my opinion the last amending Act (40 & 41 Vict. c. 34) extends to leaseholds. The first Act contained the words "entitled to any estate or interest in any lands or other hereditaments," and Sir *G. Jessel*, M.R., held in *Solomon* v. *Solomon*, that those words would have been sufficient to include leaseholds, but for the words, "the heir or devisee to whom such land or hereditaments shall descend or be devised," which followed, and which shewed that the Act was addressed only to the case of land which passed to an heir or a devisee, which could not be the case with leaseholds. Many defects were discovered in that Act, and the Act of 1867 was passed for the purpose of curing them. That Act proved ineffectual to cure all the defects, and the third Act, that of 1877, was passed. I think that the Legislature have succeeded in including leaseholds in that Act, and for this reason—

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necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

And, by sect. 2, "In the construction of the said Act and of this Act, the word 'mortgage' shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator."

40 & 41 Vict. c. 34, s. 1: "The Acts mentioned in the schedule hereto shall, as to any testator or intestate dying after the 31st of December, 1877, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase-money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate, unless (in the case of a testator) he shall within the meaning of the said Acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate."

(1) 33 L. J. (Ch.) 473.

(2) 4 Ch. D. 665.

the Act uses the words "any land or other hereditaments of whatever tenure," which, as it seems to me, must extend to leaseholds, there being, moreover, a corresponding alteration in the subsequent words, which now are "devisee, legatee, or heir." It seems to me that the introduction of the word "legatee" negatives the inference which was founded upon the use of the words "heir or devisee" in the first Act. It would, I think, be too narrow a construction of the word "legatee" to say that it applies only to a legatee of lands demised *pur autre vie*. In my opinion, the Act extends to leaseholds.

I must, therefore, make a declaration that all the testator's interest in the leasehold house passed under the bequest to the Defendant, subject to her liability to pay the purchase-money of the reversion out of her own moneys.

Solicitors for all parties: *Drake, Son, & Parton.*

W. L. C.

In re FLECK.
COLSTON *v.* ROBERTS.

[1887 F. 749.]

Will—Mortgage Debt—Locke King's Act (17 & 18 *Vict. c.* 113) [*Revised Ed. Statutes, vol. xii., p.* 387]—*Amendment Act* (30 & 31 *Vict. c.* 69) [*Revised Ed. Statutes, vol. xv., p.* 413]—*Contrary Intention.*

A testator directed his private debts to be paid out of the proceeds of certain life policies; he bequeathed his residue, subject to the payment of his trade debts; after the date of his will he deposited the title deeds of real estate with his bankers to secure an overdrawn trade account:—

Held, that this amounted to a declaration of intention contrary to *Locke King's Act*, and that the devisee of the real estate was entitled to have it exonerated from the banker's lien.

JAMES THOMAS FLECK, late of *Stanley-cum-Wrenthorpe, Wakefield*, in the county of *York*, twine manufacturer, made his will dated December, 1874. After bequests of legacies and an annuity to his wife and an annuity to his only son, *Henry Arthur Fleck*, the will contained the following provision: "And as to the under-mentioned moneys belonging to my estate, namely,

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£999 19*s.* to arise from the policy of life assurance on my life originally with the *Minerva*, but now transferred to the *Standard Life Assurance Company*, also £1000 to arise from the policy on my life with the *United Kingdom Temperance and General Provident Institution*, with the bonuses on the said policies respectively, I direct my executors to receive the said moneys and appropriate the same in or towards payment in due course of all my private debts, including any promissory notes or other engagements whatsoever which I may have entered into previous to my death, not being trade debts, and all my funeral and testamentary expenses and the legacies hereby bequeathed, and the surplus (if any) of such moneys, after making such payments thereout as aforesaid, shall be placed to the credit of my current account with Messrs. *William Williams, Brown, & Co.* of *Leeds*." The testator gave some other small pecuniary legacies. He devised his real estate, including his manufacturing premises, and bequeathed his residuary personal estate to his executors and trustees on trust as to the real estate after the death of his wife to pay the rents and profits to his only daughter *Jane Eliza*, the wife of *Edward Hefferman*, for her separate use for life, and after her death for her children, and in default of her children then on certain trusts. The will then proceeded: "And as to all the residue of my personal estate after and subject to the bequests and provisions in regard thereto hereinbefore contained, and to the payment of my trade debts (which I hereby declare shall be a charge upon my personal estate), I will and direct that the same, including the whole of the twine machinery in my said mill, but not the main shafting (which, together with engine, boilers, and other fixtures shall, as I have hereinbefore directed, form part of and be deemed to belong to my real estate), and the stock-in-trade of yarns, twines, and other trade effects, together with all books, debts, and other matters and things connected with my said trade (over and beyond what is needful for payment of all my trade debts), shall be held in trust for my said son *Henry Arthur Fleck*, if and when he shall attain the age of twenty-five years, providing my said trustees shall deem it advisable and my said son shall in their judgment be then competent to conduct and carry on the business."

The will contained provisions for the management of the testator's business till his son attained twenty-five, the sale of the business in case the trustees should not think it desirable that his son should undertake the business, and trusts of the personal estate for the benefit of the testator's son and the son's children, with remainder over in default of children. The testator made a codicil dated December, 1874, which altered the trusts of the real estate in case of default of children of his daughter in her favour.

The testator's wife predeceased him. He died in November, 1887. His son had then attained twenty-five. The testator's daughter survived her first husband and was now the wife of *Thomas Richard Roberts.*

The testator's will and codicil were proved by *Alfred Cotton* and *William Elliott,* the two surviving executors named in his will. The former during the life of the testator had taken part in the management of the testator's business. He made an affidavit in the matter containing the following paragraph: "The said testator kept his banking account with Messrs. *William Williams, Brown, & Co.* of *Leeds,* bankers, and he was indebted to them in the sum of £4900 1*s.* at the time of his death, and this debt appears in the business book kept by the said testator at his said mill. On the 23rd of July, 1884, the said bankers wrote to the said testator that his overdraft was getting considerably out of proportion to the business done, and suggested that he reduced his stock-in-trade, whereupon the said testator had an interview with them and deposited the deeds relating to his real estate with them as a security, and the said deeds were so deposited at the time of his death."

This was an originating summons to which the executors and trustees were Plaintiffs and Mrs. *Roberts* and *Henry Arthur Fleck,* the testator's daughter and son, were the Defendants, to determine among other questions whether the debt due to the testator's bankers was payable primarily out of the testator's personal estate or out of the real estate of which the deeds were deposited with the bankers to secure such debt. For the purpose of having the question decided it was conceded that the debt due to the bankers was a trade debt.

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Vernon Smith, for the trustees.

Cookson Crackanthorpe, Q.C., and *Archibald Brown*, for Mrs. *Roberts*:—

The testator in saying that his trade debts are to be paid out of a particular fund, included in trade debts the debt to his bankers incurred for trade purposes. He has very carefully provided by his will the exact way in which all his debts are to be paid; he has shewn, if not expressly, certainly by necessary implication, that this debt is to be paid out of the residue, and is not to be paid out of any property on which it may be secured: *Eno* v. *Tatham* (1); *Mellish* v. *Vallins* (2).

Warrington, for *Henry Arthur Fleck*:—

There is nothing more than a direction that debts shall be paid out of personal estate; the case, therefore, is hit by *Locke King's Act Amendment Act* (30 & 31 Vict. c. 69). It makes no difference that the debts are payable out of a particular part of the personalty, or two classes of debts are made payable out of separate parts of the personal estate. The testator cannot be supposed to have had in his mind any thought about discharging a mortgage debt, he certainly has not used language that can be construed to have reference to any mortgage debt either existing at the date of his will, or to be made after that date: *Nelson* v. *Page* (3); *In re Rossiter* (4).

NORTH, J.:—

The 1st section of the *Amendment Act* (30 & 31 Vict. c. 69), referring to *Locke King's Act*, provides that "a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said Act, unless such contrary intention or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate." Now

(1) 3 D. J. & S. 443.
(2) 2 J. & H. 194, 202.
(3) Law Rep. 7 Eq. 25.
(4) 13 Ch. D. 355.

I do not consider it necessary under that statute that the debt or debts should be referred to as mortgage debts. Such a debt must be sufficiently described to identify it as being the particular debt which happens to be secured by mortgage. And if a debt is described as the debt which the testator owes his banker, which in fact is secured by mortgage, there would not by that fact be the less an expression of a contrary intention. All that is required is, that the debt shall be specifically described and identified in some way. The Act does not mean that it shall be described as a mortgage debt, but any thing that will identify it will be sufficient for the purpose. A general direction that all debts shall be paid out of personal estate is not sufficient. There is not here such a general direction, what the testator has done is to provide very carefully for the payment of different debts out of different parts of his estate. He says that his private debts are to be paid out of the proceeds of certain policies; and further on in his will he disposes of his residue "after and subject to the bequests and provisions in regard thereto hereinbefore contained, and to the payment of my trade debts (which I hereby declare shall be a charge on my personal estate)." I take that to be a clear direction that the trade debts are to be paid out of a particular fund; and that it is only the surplus beyond that which is to go for the benefit of the son. We have, therefore, the debts divided into two classes; which I consider an exhaustive division. There is no debt which is neither a trade debt nor a private debt, but which is a mortgage debt. The fact that the testator had received large sums of money for his trade, and that he is asked for or gives security by way of deposit, does not make that which is a trade debt other than a trade debt. If it is clear that immediately before the deposit, the debt was a trade debt, can it be said that the testator's intention is in any way changed by his making the deposit? In my opinion the last thing he intended was to take the secured debt out of the class of trade debts. It seems to me that in this case a particular part of the debts was charged on a particular part of the personal estate. The other portion of the debts was charged on another part of the personal estate, and there was some personal estate not charged with any part of the debts. Of course the incidence of debts by

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operation of law in case the funds provided should not be sufficient would not be affected. The testator has not given any general direction that his debts are to be paid out of his personal estate; but he has made a particular specific provision which takes the case out of the Act. And the testator has by necessary implication shewn an intention that the Acts shall not apply.

Solicitors for the trustees: *Bell, Brodrick & Gray.*

Solicitors for Mrs. *Roberts: Pitman & Sons,* agents for *Booth & Booth, Leeds.*

Solicitors for *H. A. Fleck: Torr, Janeways & Co.,* agents for *Evan M. Jones, Leeds.*

D. P.

In re WHITEHOUSE. WHITEHOUSE *v.* EDWARDS.

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Oct. 28; *Nov.* 1, 8.

[1887 W. 950.]

Parent and Child—Advancement—Contract for Purchase by Son—Payment of Part of Purchase-money by Father—Security of Remainder by joint and several Promissory Notes of Father and Son—Payment by Parent of one Note—Death of Parent before maturity of others—Payment of others by Father's Executors under Pressure from Vendor.

In March, 1885, *W.*, a son of the testator, entered into a contract for the purchase of a business for £1500, of which £300 was to be paid at once and the residue by instalments, to be secured by the joint and several promissory notes of *W.* and the testator. *W.* had no property of his own, and the testator, who was not a party to the contract, paid the £300, and he and *W.* gave their joint and several promissory notes to the vendor for the instalments.

The testator paid the amount due on the first promissory note, but died before any of the others became due, having by his will, dated in October, 1885, given benefits to his sons, and declared that before any of them should participate under his will they should repay all sums of money advanced to them during his lifetime, and if unable to do so, "such advances" should be taken as part of their shares under the will. Shortly after the testator's death *W.* executed a creditors' deed, whereby he assigned all his property for the benefit of his creditors, and the creditors released him but reserved their rights as against his sureties. Nothing further having been paid in respect of the purchase-money, the vendor proved under the deed for the whole balance secured by the remaining promissory notes, and failing to obtain payment, carried in a claim against the estate of the testator, and the executors paid the amount less a discount:—

Held, first, that the sums paid by the testator during his lifetime were, and that those paid by his executors after his death were not, advances to be taken as part of *W.'s* "share" within the meaning of the clause in that behalf in the will of the testator:

Held, secondly, that upon the true construction of the will the word "share" meant not the income which *W.* was to enjoy, but the *corpus* of the share itself, and that the sums paid by the testator during his lifetime were payable thereout accordingly:

Held, thirdly, that the contract for purchase being a contract by the son alone, the giving of the joint and several promissory notes by the testator was not in the nature of an advancement by the testator in favour of his son *W.*, but merely placed the testator in the position of a surety for *W.*

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the principal. *Dyer* v. *Dyer* (1), *Redington* v. *Redington* (2) and *Drew* v. *Martin* (3) distinguished:

Held, fourthly, that the executors of the testator having paid the amounts of the promissory notes falling due after his death, were entitled to elect whether they would recover against the principal debtor under the agreement arising out of the suretyship, in which case they would be entitled to be paid or retain out of the income of *W.'s* share, or whether they would stand in the place of the vendor, the principal creditor, whom they had paid; but that in the latter case they must give up their right of retainer.

ADJOURNED SUMMONS.

George Frederick Whitehouse, one of the sons of the testator in this action, during his father's lifetime entered into an agreement with one *Cartland* for the purchase from him of the business of a brass-founder at the price of £1532 6*s.* 8*d.* The agreement, to which the testator was not a party, bore date in March, 1885, and one of its terms was that the sum of £300, part of the purchase-money, should be paid down in cash upon the execution of the agreement, and that the residue of the purchase-money should be payable by instalments, and should be secured by the joint and several promissory notes of *George Frederick Whitehouse* and the testator. *George Frederick Whitehouse* had no money of his own, and the testator, in order to enable him to purchase the business, lent him the sum of £300 payable in cash under the agreement, and joined with him in giving joint and several promissory notes for the balance. Such promissory notes were all dated the 1st of January, 1885, and were for the amounts and payable as follows:—£133 17*s.* six months after date; £133 16*s.* 11*d.* and £309 3*s.* 7*d.* twelve months after date; £321 two years after date; and £333 18*s.* 3*d.* three years after date.

G. F. Whitehouse took possession of the business under the agreement, and carried it on; and the testator paid the sum of £144 16*s.* 1*d.* for principal, interest and costs in respect of the sum secured by the first of the promissory notes.

The testator, by his will, which was dated the 2nd of October, 1885, appointed the Plaintiffs his trustees and executors, and devised and bequeathed to them all his residuary and real and

(1) 1 W. & T. L. C. Eq. 6th Ed. p. 236. (2) 3 Ridg. P. C. 106.
(3) 2 H. & M. 130.

personal estate upon trust for sale, conversion, payment of debts and legacies and investment, and directed them to hold the trust fund (subject to the payment of an annuity to his wife) upon trust as to one-fifth part thereof for his son *Daniel* absolutely, and as to another fifth part, to invest it and pay the income to his son *George Frederick* during his life, without power of anticipation, and after his death to hold the capital and income of his share in trust for his children—sons at twenty-one and daughters at that age or marriage—in equal shares, and if there should be no such child of *George Frederick*, then, subject to the trusts in favour of him and his issue, the testator directed that "his original share, and any share or shares which shall have accrued under this provision, shall accrue to and be held in trust for my other children in equal shares, but so that the further shares accruing to each of them shall be held by the trustees or trustee upon and subject to the like trusts and powers as are hereinbefore and hereinafter declared concerning their original shares." The testator then declared similar trusts of the remaining three-fifths in favour of his son *Henry Arthur* and his two daughters, and after giving a power of advancement extending to half the expectant or presumptive share of any grandchild, declared as follows:—"Before any of my three sons, the said *Daniel*, *George Frederick* and *Henry Arthur*, shall participate under the trusts of this my will, they shall repay to the trustees or trustee all sums of money that I have advanced to them during my lifetime; but the trustees or trustee for the time being of this my will shall not be answerable or accountable in any way in case my said sons shall be unable to repay such sums of money so advanced by me to them as aforesaid, but such advances shall be taken to be as part of their shares under the trusts of this my will."

The testator died on the 20th of May, 1886. He had paid nothing beyond the first of the promissory notes as above-mentioned, though two others matured in his lifetime.

G. F. Whitehouse carried on the business until June, 1886, but it was unsuccessful; and on the 12th of June, 1886, he executed a deed of assignment for the benefit of his creditors, whereby he assigned all his property upon trust for sale and payment of his debts according to the law of bankruptcy, which deed contained

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a reservation of the rights of the creditors against sureties. *Cartland* executed the deed as a creditor for £1098 9*s.* 8*d.*, the balance of the purchase-money. He also subsequently carried in a claim against the estate of the testator for the same amount, and the testator's executors paid him the sum of £1025 (being the amount due less a discount) in satisfaction of all claims against the estates of the testator or *G. F. Whitehouse.*

This summons was taken out by the executors in March, 1887, in order to have the following questions determined by the Court:—

1. Whether the sums paid by the testator in his lifetime, or by his executors after his death, or any and which of them, constituted debts from *G. F. Whitehouse*, the son, to the testator's estate?

2. Whether the same were advances within the meaning of the clause in the will of the testator?

3. Whether the same should be retained out of the *corpus* of the share settled upon *G. F. Whitehouse*, the son?

4. Whether the same were primarily charged on the life interest of *G. F. Whitehouse* in such share?

5. Whether the executors were entitled to retain the said life interest to satisfy any such sums as might not be expressly charged on the share of *G. F. Whitehouse?*

Whether they should make any claim under the trusts of the indenture of the 12th of June, 1886?

W. Phipson Beale, for the Plaintiffs.

F. H. Colt, for the assignee under the creditors' deed:—

There is no debt due from *G. F. Whitehouse* to the estate of the testator either in respect of the sums paid by the testator in his lifetime, or of those paid by his executors after his death. The £300 paid by the testator on the purchase, and the £144 16*s.* 1*d.* paid by him during his lifetime, were clearly advancements by the father to his son creating no debt. They were gifts, and therefore not within the clause in the will as to advances; but if they did create a debt they were advances under the will to be satisfied out of the *corpus* of the share: *Auster* v. *Powell* (1). As

(1) 1 D. J. & S. 99.

regards the sums paid by the testator's executors after his death, the liability undertaken by a father who enters into a joint and several promissory note with his son is in the nature of, and constitutes an advancement to, the son. There is no direct authority upon the effect of such a joint and several promissory note, but it comes within the principle enunciated in *Dyer* v. *Dyer* (1), citing *Redington* v. *Redington* (2), at 1 *White* and *Tudor's* Leading Cases in Equity (5th ed.), p. 243; *i.e.*, that "where a contract is entered into to purchase real property in the name of a wife or child, although the wife or child as volunteers could not file a bill for specific performance of the contract, nevertheless if the vendor enforces, or is entitled to payment out of the husband's estate, the conveyance must be made to the wife or child." This principle was adopted as sound, and *Redington* v. *Redington* was followed, by Lord *Hatherley* in *Drew* v. *Martin* (3).

So here, the father paid down part of his son's debt in respect of the purchase-money, and agreed to pay the remainder. The purchase was a starting of the son in the world. It is true that if they had been strangers it would only have been a contract for suretyship, but here the father clearly intended to run the risk of having to pay the promissory notes if the son was unable to do so. The son was unable, and the father in his lifetime paid one promissory note, and his executors after his death paid the others under pressure from the holder. This was an advancement—a contingent conditional advancement. The volunteer could not enforce payment, but if the vendor choose to do so, there is no right of recourse to the son's estate.

Willis Bund, for *H. A. Whitehouse*:—

In this case the contract was the contract of the son alone, and there was no contract by the father, nor any clear indication of intention to benefit the child; and this distinguishes the case from those in which the transaction has been held to be an advancement. The charge can only be upon what *G. F. Whitehouse* took under the will, *i.e.*, upon his life interest and not upon the *corpus*.

(1) 1 W. & T. L. C. Eq. 6th Ed. p. 236. (2) 3 Ridg. P. C. 106.
(3) 2 H. & M. 130.

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This summons raises several questions, some of them of considerable nicety, as to the mode of administering the estate of the testator. [His Lordship then stated the will (observing that the restraint on anticipation attached to the gift of the life interest to *G. F. Whitehouse* was of course bad) and the facts of the case, and then continued:—] The first question that I have to deal with is whether all or any of the sums paid by the testator in his lifetime and by his executors after his death are to be deemed sums of money advanced by the testator during his lifetime within the meaning of the clause in his will which directs that all sums of money advanced by him to his sons in his lifetime are to be dealt with in a particular way. And it seems to me that the two sums paid by the testator in his lifetime, *i.e.*, the £300 advanced at the time of the purchase, and the sum paid on the promissory note which first fell due, are advances made by the testator during his lifetime. That hardly wants authority, but the case of *Auster* v. *Powell* (1) decided by Lord *Westbury* seems to govern this question.

The next question is whether the sums paid by the executors after the testator's death are sums advanced during the testator's lifetime, and I think that they cannot be said to be so. No doubt the testator had incurred in his lifetime a liability which resulted in his executors being compelled after his death to pay out of his estate certain sums; but those sums do not seem to me to be in any way aptly described as advances made by the testator during his lifetime, and I so hold.

The next question is, what is the proper course of dealing as to the sums advanced by the testator during his lifetime. Upon that the will is reasonably clear, for the testator directs that before any of the sons are entitled to participate in the benefits conferred by the will they are to make repayment of all such sums. Then it is said that the son, *G. F. Whitehouse*, is at present unable to make such repayment. That also appears to be provided for by the will, for the testator says that if any of his sons are unable to repay these advances, such advances are to be treated as part of their shares. What does part of their shares mean? It was

(1) 1 D. J. & S. 99.

contended that, in the case of *G. F. Whitehouse*, it meant that the advances were to be repaid out of the income coming to him during his life; in which case there could not be a complete ascertainment of the shares until the income had been applied in paying the advances. On the other hand it was argued that the testator intended a settlement and division of his property at once, and by the word "shares" meant not the income of the fund given to *G. F. Whitehouse*, but the *corpus* of the share itself. And I think upon the true construction of the will that is the proper view. It seems to me that the language used by the testator in the direction for accruer is practically conclusive on this point, for in that clause, although the children are, as to the settled shares, only entitled to the income of them during their lives, he treats such settled shares as being the shares of those children. And this view is confirmed by the circumstance, that as regards the share of his son *Daniel* the testator directs an immediate payment. So that he contemplated the immediate winding-up of his affairs, and not the postponement of the ascertainment of his final estate until those advances had been satisfied.

Then it was further contended on behalf of *G. F. Whitehouse* that while the sums paid by the testator and his executors were not sums of money advanced by him during his lifetime, within the meaning of the clause in the will directing repayment of such sums, they were to be deemed and treated as "advances" in the sense in which the word is used with reference to a provision or "advancement" by a father to a son. And in support of this contention Mr. *Colt* relied upon *Dyer* v. *Dyer* (1), and more particularly upon two cases: *Redington* v. *Redington* (2), which was an Irish case, and *Drew* v. *Martin* (3), in which *Redington* v. *Redington* was followed by Lord *Hatherley* when Vice-Chancellor.

The third sentence in the judgment of Lord Chief Baron *Eyre* in *Dyer* v. *Dyer*, which was decided in 1788, shews what the law as there laid down was (4): "The clear result of all the cases, without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of

(1) 1 W. & T. L. C. Eq. 6th Ed. pp. 236, 238.
(2) 3 Ridg. P. C. 106.
(3) 2 H. & M. 130.
(4) 1 W. & T. L. C. Eq. 6th Ed. p. 238.

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the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money. This . . . . goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the established doctrine of a Court of Equity, that this resulting trust may be rebutted by circumstances in evidence. The cases go one step further, and prove that the circumstance of one or more of the nominees being a child or children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases, that the nominee, being a child, shall have such operation as a circumstance of evidence, that we should be disturbing landmarks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence." The law was again more recently laid down by Sir *G. Jessel*, M.R., in *Marshal* v. *Crutwell* (1): "As I understand it, the law is this: The mere circumstance that the name of a child or a wife is inserted on the occasion of a purchase of stock is not sufficient to rebut a resulting trust in favour of the purchaser if the surrounding circumstances lead to the conclusion that a trust was intended. Although a purchase in the name of a wife or a child, if altogether unexplained, will be deemed a gift, yet you may take surrounding circumstances into consideration, so as to say that it is a trust, not a gift. So in the case of a stranger, you may take surrounding circumstances into consideration, so as to say that a purchase in his name is a gift, not a trust."

These cases do not apply directly to the case before me. The cases which were more particularly relied upon were those of *Redington* v. *Redington* (2) and *Drew* v. *Martin* (3). The case of *Redington* v. *Redington* is reported at great length in the 3rd volume of *Ridgway's* Cases, and the greater part of it related to entirely different matters. In fact the point for which it was cited appears in the course of the argument, and is only referred to almost incidentally at the close of the judgment. Without reading it

(1) Law Rep. 20 Eq. 328, 329. (2) 3 Ridg. P. C. 106.
(3) 2 H. & M. 130.

from the report, the statement of it given by Lord *Hatherley* in *Drew* v. *Martin* (1) seems to give the substance of the whole thing. He states it thus (2): "There a father purchased in the name of one of his sons certain property, and before the purchase-money had been fully paid became desirous of transferring the benefit to another son; but it was held that he was not entitled to do so, and in the conclusion of the judgment this passage occurs: 'One objection had nearly escaped my memory, and that is that by this decree the executor of old *Thomas Redington* is directed to make good out of his personal estate any balance which may appear upon the account to remain unpaid of the original purchase of *Reyhill*. The ground upon which I made that a part of the decree simply was, that by the agreement of old *Thomas* to make this purchase for his son *Michael*, this balance unpaid is in equity as much a debt of his as any other debt of the same nature, and I conceive that his personal estate must be subject to it, more particularly as he has devised it to the Appellant *Thomas* the younger expressly subject to his debts.'" Then the Vice-Chancellor says: "It is clear that the decree does not rest merely on the paternal relation, but on the principle that, as the vendor could insist on payment, it was not a case of enforcing a contract for a volunteer, but merely a question who was to have the estate." Now, in that case it is stated that the father purchased in the name of one of his sons certain property. I understand that to mean that an agreement for sale and purchase was entered into between the vendor on the one hand and the son on the other, but that the agreement, though entered into by the son, was entered into by the son at the request of the father. Further there was a stipulation in the contract that the property should be conveyed to the son on completion. So that you have three elements, first, a contract by the son; secondly, a right by the son to resort to the father or to the father's estate for the payment. This right arose out of an express agreement, for the Lord Chancellor of *Ireland* states that there was such an agreement: and this agreement, which could not be a matter of presumption, but must have been the subject of evidence, was one between the father and the son to the effect that although the

(1) 2 H. & M. 130. (2) 2 H. & M. 133.

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son incurred the liability and entered into the contract, he was to be indemnified in equity by the father. Then, thirdly, there was a stipulation that the conveyance when the purchase-money was paid was to be made to the son. It seems to me the doctrine of *Dyer* v. *Dyer* (1) comes in by reason of there being, first, a conveyance to the son, and then the money paid out of the father's estate. In the result, therefore, the presumption arose that this was a provision made by the father for the son, or, in other words, an advancement.

In the case of *Drew* v. *Martin* (2) the circumstances were somewhat different. A contract was entered into which was expressed to be between the vendor on the one hand and the testator and his wife on the other—a joint contract with the testator and his wife. According to law that was a contract by the husband alone, and the vendor had a direct right to enforce that contract against the husband and his estate. Then, as the Vice-Chancellor construed the contract, there was a stipulation that on completion the property was to be conveyed to the husband and wife jointly, and the husband having died there remained an obligation on the part of the vendor to convey to the wife. That being so, it was held that upon the completion of that contract, the purchase-money being paid out of the testator's estate, and there being no liability on the wife to pay it, and the conveyance being made to her, the presumption again arose that there was a provision for the wife, or an advancement.

Now it seems to me that these cases differ from the present in one very material respect, which is this, that in both those cases there was a contract by the testator himself that the purchase-money should be paid by himself or out of his estate. Here the testator was not a party to the contract of purchase. There is no evidence that this was in any way the contract of the testator, and it is not suggested that there was a contract by him to indemnify his son. It is a contract by the son to purchase and pay for a certain business. The purchase-money is payable by instalments, and the only way in which the father is mixed up in it at all is this, that it is stipulated by the contract that these instalments should be secured by the joint and several promissory

(1) 1 W. & T. L. C. Eq. 6th Ed. p. 236. (2) 2 H. & M. 130.

notes of the father and son. That entirely distinguishes this case from *Redington* v. *Redington* (1) and *Dyer* v. *Dyer* (2), and the doctrine there laid down has no application to this case.

Now I am asked to say that this is an advancement by the father. Observe what would be the result of so holding. It is the son's contract. The son has no right as between his father and himself to resort to the father or his estate for a single penny of the purchase-money. Therefore if the son voluntarily pays the purchase-money without recourse being had to the father there is no advancement. Again, if the son does not pay voluntarily but is sued by the vendor either on the contract or the promissory note, and judgment is recovered, and full satisfaction obtained, he has no right to have recourse to the testator's estate, and he has to bear the burden himself, and there is no advancement. But it is said that if, on the other hand, the vendor chooses to sue the father and recover satisfaction, then that is to be deemed an advancement. That does not seem to me to be the just and natural conclusion from the facts, because, according to the law as laid down by the Lord Chief Baron in *Dyer* v. *Dyer*, and by the Master of the Rolls in *Marshal* v. *Crutwell* (3), you are to look at all the circumstances; and it seems to me that the natural conclusion to be drawn from the facts is this, that it was the son's contract, that it was hoped and expected that by time being granted he would be able out of the profits of carrying on this business to pay the balance of the purchase-money, and that by way of assisting him the father was willing to join and concur in giving joint and several promissory notes, but that he did nothing to bind himself to treat that as a gift to the son. He was simply left in the position in which the law puts him, namely, that of being a surety only, the son being the principal.

Then, that being the state of the case, the next question which arises is, what are the rights of the executors of the father who have paid the greater part of what is due on the promissory notes? That point was not very fully discussed by counsel in the argument. But I have worked it out, and I think it right to indicate the general conclusion at which I have arrived, because

(1) 3 Ridg. P. C. 106. (2) 1 W. & T. L. C. Eq. 6th Ed. p. 236.
(3) Law Rep. 20 Eq. 328, 329.

STIRLING, J. I cannot in this respect answer the questions put by the summons precisely in the way they are put. The son after the father's death, and before those sums were paid, executed a deed by which he assigned all his property to certain trustees for the benefit of his creditors. There was to be a trust for sale, and out of the proceeds, after payment of the costs of the instrument, "to pay and rateably discharge according to the law of bankruptcy and without preference or priority, and by such dividends as the trustee shall think fit, the debts due from the debtor to the creditors, and to pay the surplus, if any, of the moneys to the debtor, his executors, administrators, or assigns, or to such other person or persons as may be legally entitled." Certain creditors joined, and there was a release, or what was in form a release, by the creditors of their debts followed by a reservation of rights against sureties. Now under that *Cartland*, the principal creditor, proved: whether he got anything I do not know, but that is immaterial. If he did get anything he did not obtain complete satisfaction, and the residue of what was due on the notes was paid by the executors. On that it is quite clear, I think, according to the law as laid down in *Green* v. *Wynn* (1) and *Bateson* v. *Gosling* (2), that the release contained in the deed was not an absolute release so far as the surety was concerned, but only operated as a covenant not to sue between the principal creditor and the debtor. Therefore the surety was not released by the execution of that deed, and the executors were right in paying, as they did, the sum due on the promissory notes.

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Then what is their position? They are, I apprehend, entitled to two rights. They may either recover directly against the principal debtor, the son *George Frederick Whitehouse*, upon the agreement for indemnity which arises out of the contract of principal and surety, or they may stand in the place of the principal creditor whom they have paid, and take the benefit of all the rights and remedies of that creditor against *George Frederick Whitehouse*. That applies more particularly with reference to the proof, because the estate comprised in the deed is to be wound up according to the law of bankruptcy, and I apprehend it is not the practice of the Bankruptcy Court to allow a double proof in

(1) Law Rep. 4 Ch. 204. (2) Law Rep. 7 C. P. 9.

respect of the same debt; that is to say, if the executors choose to come in under this deed they must adopt the proof already made by *Cartland* and stand exactly in his place. Then upon that, arises this question—if they choose to stand in *Cartland's* place, will not the release which he gave to the son, *George Frederick*, be effective as between the executors and *George Frederick?* It seems to me that it will, and I am confirmed in that view by the case of *Stammers* v. *Elliott* (1). I think, therefore, that the position of the executors is this, they may choose whether they will stand on the original contract of principal and surety, in which case they are in no way bound by the terms of the creditor's deed, and will be entitled to be paid out of the income; or they may choose whether they will go in under the deed, in which case they will be bound by the release contained in that deed, and must give up the right of retainer. The course to be pursued must be determined by what is best for the estate. The costs of all parties must come out of the estate.

Solicitors: *Kennedy, Hughes, & Kennedy*, agents for *Delves-Broughton & Colmore, Birmingham; H. Tyrrell*, agent for *J. B. Clarke & Co., Birmingham; Miller & Miller*, agents for *Foster, Birmingham.*

W. W. K.

In re HORNER.
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[1887 H. 729.]

Will—Construction—Bequest to "Children"—Illegitimate Children—"Representatives."

A testator by his will, dated in 1868, directed his trustees to pay the income of a certain share in a trust fund "to my sister *Charlotte*, the wife of *Thomas H.*," during her life, and after her death to pay and divide the share unto, between and amongst all "her children" who should be living at her death, and the "representatives" of such of them as should have died in her lifetime who should have attained twenty-one, equally, share and share alike.

Charlotte never was the wife of *Thomas H.*, he having previously to 1845

(1) Law Rep. 3 Ch. 195.

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married another woman, who at the date of the will and down to his death in 1875 was his lawful wife.

In 1845 *Charlotte* left her home, and thenceforth cohabited with *Thomas H.* until he died. At the date of the will she had had four illegitimate children by him, the two survivors of whom were then living, aged respectively twenty and eighteen; and she had not had a child for seventeen years, and was presumably past child-bearing. *Charlotte* died in 1885. These were the only children she ever had, and only one of them survived her.

The testator was well aware of the connection of his sister with *Thomas H.*, visited at the house where they resided, and recognised the children of his sister by *Thomas H.* as his own nephews and nieces:—

Held, that the testator in describing his sister *Charlotte* as the "wife" of *Thomas H.*, when he knew she was not so, and in using correlatively with that the expression "children" to describe the offspring of a woman whom he knew not to be lawfully married, had shewn that he did not use the term "children" in its strict legal sense; and that, applying the principles laid down in *Hill* v. *Crook* (1), the illegitimate children of *Charlotte* were intended, and were entitled to take under the gift in the testator's will.

Hill v. *Crook* (1) and *Dorin* v. *Dorin* (2) explained.

In re Ayles' Trusts (3), *Ellis* v. *Houstoun* (4), and *Megson* v. *Hindle* (5) considered.

Held, also, that the word "representatives" in the gift must be construed either as "next of kin" or as "descendants," and not as "executors or administrators."

ADJOURNED SUMMONS.

The testator, *Charles Palmer Horner* (who died in February, 1870), by his will, dated the 21st of January, 1868, after giving his residuary real and personal estate to trustees upon trust for sale, conversion, and investment, directed his trustees to divide the trust fund into three equal parts, and to stand possessed of one of such parts upon trust to pay the annual income thereof to his brother *William* during his life, but without power of anticipation, and after his death "to pay and divide the said third part unto, between, and amongst all his children who shall be living at the time of his decease, and the representatives of such of them as may have died in his lifetime who shall have attained the age of twenty-one years, equally, share and share alike, but so nevertheless that the representative or representatives of such

(1) Law Rep. 6 H. L. 265.
(2) Ibid. 7 H. L. 568.
(3) 1 Ch. D. 282.
(4) 10 Ch. D. 236.
(5) 15 Ch. D. 198.

of them so dying shall take only the share to which the deceased child would have been entitled had he or she survived the said *William Horner*, and if there shall be but one such child, then I give and bequeath the whole of such part to such only child. And I direct my said trustees to stand possessed of one other third part of my said residuary estate upon the like trusts for the benefit of *my sister Charlotte, the wife of Thomas Horner, and her child or children* as are hereinbefore expressed concerning my said brother *William Horner*, and his child or children. And to stand possessed of one other third part of my said residuary estate upon the like trusts for my sister *Sarah Carpenter*, widow, and her child or children. And I direct that the interests of each of my said sisters under this my will shall be paid to and taken by her for her sole and separate use, free from marital control and without power of anticipation, and that her sole receipt shall be a sufficient discharge for the same."

It was as to the share of the testator's sister *Charlotte* that the question in this summons arose. The testator's sister *Charlotte* was not the wife of *Thomas Horner* (who was her cousin) at the date of the will, or at any other time. *Thomas Horner* had married another woman in 1837, but had ceased to reside with her in 1845. At the date of the will this woman was living and his lawful wife, and she continued to be so down to the date of his death in 1875, and died herself in 1878. In 1845 the testator's sister *Charlotte* left her father's house, and went to cohabit with *Thomas Horner*. She continued to cohabit with him as his wife down to the time of his death, and had four children by him, viz., *Charlotte Horner*, who was born on the 13th of February, 1846, and died in the month of April following; *Annie Horner*, who was born on the 23rd of March, 1847, and died intestate in August, 1886; the Defendant, *Thomas Horner*, who was born on the 24th of August, 1849; and *Charles Horner*, who was born on the 17th of November, 1850, and died three days afterwards. She never had any other child, and at the date of the testator's will had not had a child for more than seventeen years, and was presumably past child-bearing.

The testator knew all the circumstances of his sister *Charlotte's* connection with *Thomas Horner*, frequently visited at the house

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where they resided, was on intimate terms with *Thomas Horner*, and recognised and treated as his own nephew and niece the two children of his sister by *Thomas Horner* who attained maturity.

The testator died in 1870, and his sister *Charlotte* in November, 1885.

This was an originating summons taken out on behalf of the trustees of the will, and the two questions to be determined were: (1.) Whether the Defendant *Thomas Horner*, and the representatives of *Annie Horner* were entitled under the gift in the will as "children" of the testator's sister *Charlotte*, notwithstanding that *Thomas* and *Annie* were both illegitimate; and (2.) What was the meaning of the word "representatives" in the gift.

Whitaker, in support of the summons.

W. Pearson, Q.C., and *Humber*, for *Thomas Horner*:—

In this case the surrounding facts known to the testator shew that in using the expression the "child or children" of his sister *Charlotte*, "the wife of *Thomas Horner*," he as clearly pointed to these particular children of her by him as *personæ designatæ*, as if he had mentioned them by name: *Hill* v. *Crook* (1); *Dorin* v. *Dorin* (2); *In re Brown's Trust* (3); *In re Humphries* (4); *In re Bryon* (5); *In re Haseldine* (6).

Ingle Joyce, for *The Attorney-General*, as representing the deceased illegitimate child, addressed the same arguments to the Court, and cited *Perkins* v. *Goodwin* (7) and *In re Hastie's Trusts* (8).

Hastings, Q.C., and *T. Dale Hart*, for the next of kin of the testator:—

In *Hill* v. *Crook* a ceremony of marriage had been gone through which the testator had recognised as, and thought was, a marriage, and further, there was a relationship between the parties which prevented their ever being legally married, and this was the

(1) Law Rep. 6 Ch. 311; 6 H. L. 265, 282.
(2) Law Rep. 7 H. L. 568, 573.
(3) Ibid. 16 Eq. 239.
(4) 24 Ch. D. 691.
(5) 30 Ch. D. 110.
(6) 31 Ch. D. 511.
(7) W. N. 1877, p. 111.
(8) 35 Ch. D. 728.

ratio decidendi of the case: as explained in *Megson* v. *Hindle* (1); *In re Haseldine* (2). In *Perkins* v. *Goodwin* (3), again, the parties never could be legally married. As stated by Lord *Selborne* in *Dorin* v. *Dorin* (4), "it is perfectly well settled . . . that the word 'children' in a will means legitimate children, unless, when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them." And here the mere description by the testator of his sister as a "wife" does not make it either repugnant or inconsistent to give to the word "children" its ordinary legal meaning: *In re Ayles' Trusts* (5). Nor has the presumption that at a given age a woman is past child-bearing, or the improbability of future children coming into being, ever been held to operate so as to let in illegitimate children: *Jarman* on Wills (6); *In re Overhill's Trust* (7); *Paul* v. *Children* (8); *Dorin* v. *Dorin* (9). Applying these authorities, in this case if *Thomas Horner* had survived his lawful wife he might have married the testator's sister *Charlotte*, and any legitimate children he might have had by her would admittedly have excluded these illegitimate children. In all the four cases of *In re Brown's Trust* (10), *In re Humphries* (11), *In re Bryon* (12), and *In re Haseldine* (13) there were special circumstances, and the latter mainly turned upon a gift of mourning.

[STIRLING, J., referred to *Theobald* on Wills (14) and *Ellis* v. *Houstoun* (15).]

W. Pearson, in reply:—

In *Ellis* v. *Houstoun* there were legitimate as well as illegitimate children. In *In re Ayles' Trusts*, *Hill* v. *Crook* (16) was not cited.

(1) 15 Ch. D. 198, 201.
(2) 31 Ch. D. 511, 517.
(3) W. N. 1877, p. 111.
(4) Law Rep. 7 H. L. 577.
(5) 1 Ch. D. 282.
(6) 4th Ed., vol. ii. p. 223, note (*y*).
(7) 1 Sm. & Giff. 362.
(8) Law Rep. 12 Eq. 16.
(9) Law Rep. 7 H. L. 571.
(10) Ibid. 16 Eq. 239.
(11) 24 Ch. D. 691.
(12) 30 Ch. D. 110.
(13) 31 Ch. D. 511.
(14) 3rd Ed. p. 219.
(15) 10 Ch. D. 236.
(16) Law Rep. 6 Ch. 311; 6 H. L. 265.

STIRLING, J. 1887. Nov. 26. STIRLING, J. (after stating the facts, continued) :—

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It seems to me, therefore, that the children in question had acquired the reputation of being the children of the testator's sister *Charlotte*.

Under these circumstances, *Charlotte* never having had any legitimate children at all, the question arises whether those illegitimate children are now entitled to take the benefit of that bequest.

The leading case upon the subject appears to be *Hill* v. *Crook* (1). In that case the testator, in his will, spoke of his "son-in-law, *John Crook*," and of his daughter "*Mary*, the wife of the said *John Crook*," and he devised and bequeathed certain property to trustees. [His Lordship then read the devise and bequest, and continued :—] The testator died in 1859, leaving *John Crook* and *Mary Crook* him surviving. It appears that *John Crook*, who was spoken of as the testator's son-in-law, had formerly been married to another daughter of the testator, *Sarah Ann*, who died in 1851; and in the beginning of 1854 *John Crook*, with the full knowledge and assent of the testator, went through the ceremony of marriage with her sister *Mary*, the person referred to in the testator's will as "my daughter *Mary*, the wife of the said *John Crook*." Two children were born of that union in November, 1854, and in July, 1858, and were recognised by the testator as being the children of *John* and *Mary Crook*, and it was as to these that the question arose whether they were entitled to participate in the bequest. There were other children born afterwards of the same union, and it appears from the report that *Mary Crook* never had any legitimate children at all.

Now it was held by *Stuart*, V.C., in the first instance, that those children were not entitled to take, but upon appeal that decision was reversed. Then there was an appeal to the House of Lords, and the case for the appellants—that is to say for those who disputed the right of the illegitimate children—was argued by Sir *George Jessel* with very great fullness, and with reference to all the cases which at that time had been decided upon the subject; and the House of Lords affirmed the decision of the

(1) Law Rep. 6 H. L. 265.

Court of Appeal. Lord *Chelmsford*, in giving judgment, says this:—[His Lordship then read from the judgment of Lord *Chelmsford* in *Hill* v. *Crook* (1), the passage commencing "Whether the testator knew," and ending "be extended to future legitimate children" (2), and continued:—] I read that with reference to a decision which I shall afterwards have to comment upon, in which that point was referred to. Then Lord *Chelmsford* winds up his speech in the House of Lords by saying, "There can be no doubt that the respondents were reputed and known as the children of *Mary Crook*, and they appear to me to be as clearly pointed to by that description as *personæ designatæ* as if they had been mentioned by name. I think, therefore, that the devise to the children of *Mary Crook* as a class applies to the respondents though illegitimate, not by necessary implication but by actual description, notwithstanding that future illegitimate children are excluded from the gift, and that the class includes future lawful children of *Mary Crook* by any after-taken husband." [His Lordship then read from the judgment of Lord *Colonsay* the passage beginning (3), "The question we have to decide is," and ending with the words, "on the same footing," and also that beginning "It is clear to me that," and ending "cannot be fairly read in any other sense" (4) and continued:—] Then he refers to the question whether legitimate and illegitimate children could take as a class, and he comes upon this point to the same conclusion as Lord *Chelmsford*. Then Lord *Cairns* makes a speech, and he goes with great fullness and with great clearness and precision into the law with reference to the construction of gifts such as these. He states that he has gone with considerable care through the long line of cases which were referred to in the argument, and he says:—[His Lordship then read the judgment of Lord *Cairns* from the words (5) "I have referred to these cases," down to the words "so as to include illegitimate children along with legitimate children," (6) and continued:—] So that Lord *Cairns* there shews that he shares the opinion of Lord *Chelmsford* and Lord *Colonsay* that illegitimate existing children might take

(1) Law Rep. 6 H. L. 277.
(2) Ibid. 278.
(3) Ibid. 280.
(4) Law Rep. 6 H. L. 281.
(5) Ibid. 282.
(6) Ibid. 283.

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under a gift along with future legitimate children. Then he passes on to consider the circumstances of the particular case. [His Lordship then resumed reading the judgment of Lord *Cairns*, and read as far as the words "the testator viewed and spoke of this connection" (1). His Lordship then continued:—] Then he goes on (and this, I think, is important) "It appears to me that the terms 'husband' and 'wife,' 'father' and 'mother,' and 'children,' are all correlative terms. If a father knows that his daughter has children by a connection which he calls a 'marriage' with a man whom he calls her 'husband,' terming the daughter the 'wife' of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person when he speaks of the 'children' of his daughter this meaning, that as he has termed his daughter and the man with whom she was living 'wife' and 'husband,' so also he means to term the offspring born of that so-called 'marriage' the children according to that nomenclature. That is all that your Lordships have to find. If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires. Treating the cases as establishing the proposition to which I have referred, I am of opinion that there is clearly, upon the face of this will, reading it simply with the knowledge which we are told to impute to the testator, a statement by him, in his own words that he meant to make a provision for the family already born of that union which he styles a 'marriage.'"

Now, applying the same principle that Lord *Cairns* there lays down, what do we find on the face of this will? We find that the testator described his sister *Charlotte* as "the wife of *Thomas Horner*." The testator knew well that his sister was not and could not be legally the wife of *Thomas Horner*. He therefore uses the term "the wife" in that connection as designating a person who passed as or was reputed to be the wife of *Thomas Horner*. He did not use the word "wife" in its strict legal meaning. Then, correlatively with that, comes the word "children," and, adopting the same mode of interpretation which Lord *Cairns* uses, if I find

(1) Law Rep. 6 H. L. 285.

that a person is designated as a "child" of a union which is not a marriage, but with respect to which the testator speaks as if it were a marriage, I must infer him to mean that included under the term "children" are the offspring born of that connection. Here *Charlotte* being in fact a person who passed as the wife of *Thomas Horner*, why am I not to hold that "her child or children" are the children who passed as such, or are reputed to be such? It seems to me that applying the same principle, and taking, as Lord *Cairns* puts it, the testator's will as his dictionary, from which I am to find the meaning of the terms he has used, that is the principle on which I am to construe the will, and that I ought so to hold.

But then it is said that in this case there was not, as there was in the case of *Hill* v. *Crook* (1), any form of marriage between the parties, and that Lord *Cairns* deals with and speaks of the form of marriage which in that case had been gone through between *John Crook* and his sister-in-law *Mary Crook*. No doubt that is so; but it seems to me that I should be narrowing the principle of interpretation on which Lord *Cairns* acted if I were to hold that the law as there laid down applies only to a case in which you find all the ingredients which existed in the particular case of *Hill* v. *Crook*. What I understand Lord *Cairns* to lay down is this, that you are to look at the will itself to ascertain the sense in which the testator used the words which you find there, and if, on applying them to the facts of the case, as known to the testator, you find that he attached to them a different meaning from that which is their proper legal sense, you are bound so to construe the will and to give effect to the will, not in its strict legal sense, but in the way in which the testator himself used the words.

But it is also said that there is authority which binds one to hold that the *ratio decidendi* depended upon the form of marriage being gone through, and it is true that in the case of *Megson* v. *Hindle* (2) the late Master of the Rolls, Sir *George Jessel*, said: "*Hill* v. *Crook* is distinguishable, because the children there were the issue of a marriage which the testator thought was a lawful one, though in fact it was unlawful." I cannot help thinking that there must be some mistake in the report there, because both

(1) Law Rep. 6 H. L. 265. (2) 15 Ch. D. 201.

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Lord *Cairns* and Lord *Chelmsford* distinctly lay it down that the testator must be taken to have known that the marriage was unlawful. I observe, however, that in the same case Lord Justice *Cotton* says (1): "*Hill* v. *Crook* (2) is the only case in which illegitimate children who had not been described as children were allowed to take; but in that case the parents were spoken of as husband and wife, and it was a necessary inference that the testator intended their children to take though the marriage was invalid;" and Lord Justice *Cotton* in substance repeats that in the more recent case of *In re Haseldine* (3). It seems to me, therefore, that on that ground I cannot depart from the interpretation which I place upon Lord *Cairns*' opinion.

The next case of any importance with which it is necessary to deal is that of *Dorin* v. *Dorin* (4), which is also a decision of the House of Lords. There the testator had two illegitimate children by the woman with whom he was living. He married her, and the day after his marriage he made a will in which he described her as his wife, and left her his real and personal property for her life. He then said: "And I leave her at liberty to direct the disposal of the property amongst our children, by will, at her death, in such manner as she should think fit, and should she make no will, I desire that the property existing at her death shall be divided, as far as it may be practicable to do so, equally between my children by her." He had not, of course, at the date of the will any children born who were legitimate, but he lived for some time after making it, and treated the illegitimate children as his own; he never had any legitimate children, and it was held that the real and personal estate of the testator was, subject to the interest given to the widow for her life, undisposed of by the will. Lord *Cairns* says (5): "I adhere to the conclusions which I was able upon the consideration of the case of *Hill* v. *Crook* to draw from the various authorities there cited. According to those conclusions I feel myself bound to ask whether, with a knowledge of the position, and what are called the surrounding circumstances, at the time the testator made his

(1) 15 Ch. D. 206.
(2) Law Rep. 6 H. L. 265.
(3) 31 Ch. D. 511.
(4) Law Rep. 7 H. L. 568.
(5) Law Rep. 7 H. L. 573.

will, there is anything upon the face of the will which enables me to say that those who in the eye of the law were not his children, were intended by him to take under the general expressions used in his will, namely, 'I leave her' (meaning his wife) 'at liberty to direct the disposal of the property amongst our children, by will, at her death, in such manner as she should think fit, and should she make no will I desire that the property existing at her death shall be divided as far as it may be practicable to do so, equally between my children by her.' The testator who used these expressions had been married to the wife of whom he speaks the day before he made his will." Then he refers to the fact that at that time there were two illegitimate children.

Now it is perfectly clear from that statement of the facts that the same test which, when applied to *Hill* v. *Crook* (1), led to the conclusion that illegitimate children were to be included, entirely fails when it is applied to *Dorin* v. *Dorin* (2). At the date of the will in the case of *Dorin* v. *Dorin* the person spoken of as "wife" was actually and legally the wife of the testator. The word "wife" was used, therefore, in the strict legal sense, and accordingly there could be no inference drawn that the testator meant to use the word "child" or "children" in any other than its strict legal sense. All the learned Lords who advised the House on that occasion, came to the same conclusion. I have read their judgments carefully, and I cannot find a single word of disapprobation of anything that was laid down in *Hill* v. *Crook*, or anything which shews an indication of any desire on the part of any one of the learned Lords to deviate from what was decided in *Hill* v. *Crook*, if indeed they could so.

Lord *Selborne's* judgment has been referred to, and he says (3): "It is perfectly well settled, as the law now stands, that the word 'children' in a will means legitimate children, unless, when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them." Applying that test to the will in the present case, I find *Charlotte* described as "the wife of *Thomas*

(1) Law Rep. 6 H. L. 265. (2) Law Rep. 7 H. L. 568.
(3) Law Rep. 7 H. L. 577.

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Horner." She was not his wife; and, therefore, if I were to hold that "wife" meant legal wife, and "child" meant legitimate child, I should be introducing, as it appears to me, a repugnancy and inconsistency between the language of the testator and the facts of the case. Therefore the case of *Dorin* v. *Dorin* (1) does not appear to me in any way to interfere with *Hill* v. *Crook* (2). There remain only two cases with which I think I need deal. They are those of *In re Ayles' Trusts* (3) and *Ellis* v. *Houstoun* (4); and in both those cases a conclusion was come to which at first sight would seem to conflict with that at which I should arrive from a consideration of the cases of *Hill* v. *Crook* and *Dorin* v. *Dorin*.

The first, *In re Ayles' Trusts*, is a decision of Vice-Chancellor *Hall*, who, I need not say, was extremely familiar with cases of this description, and whose opinion on such a point is of the greatest possible value. The will in that case was that of a testator, who, in March, 1839, gave to trustees the sum of £450 "upon trust to invest, and to pay the income 'to my daughter *Ann*, the wife of *James Hicks*, for her separate use for life,' without power of anticipation, and to divide the principal between 'all the children of my daughter *Ann* as and when they shall respectively attain the ages of twenty-one years, in equal shares.'" The testator died in 1840. The report states that "For some time previously to his death, and at the dates of the will and his death, *James Hicks* and the daughter *Ann* were living together as man and wife at *Burley*, where the testator resided until within a few months of his death, but no ceremony of marriage had been or was gone through till the 10th of October, 1845, when they were married. Three children were born before the marriage—one before the testator's will and two after his death, and one, the petitioner, after the marriage." Then a petition was presented for distribution of the fund which had arisen from the sale of the property, the petitioner being the legitimate child; and counsel for the petitioner asked for a declaration that he was entitled to the whole of the property, submitting that there clearly was no intention to provide for illegitimate children. Counsel for respondents—illegi-

(1) Law Rep. 7 H. L. 568.
(2) Ibid. 6 H. L. 265.
(3) 1 Ch. D. 282.
(4) 10 Ch. D. 236.

timate children of the daughter *Ann*—contended that as the testator must have known all the facts and circumstances connected with his daughter and *James Hicks* and their first-born child, as they were all residing at *Burley*, where the testator had the opportunity of seeing them daily, they had acquired the reputation of being the children of *James Hicks* and his daughter; and he contended that upon the authority of the decisions in *Occleston* v. *Fullalove* (1), *In re Brown's Trust* (2), and *In re Goodwin's Trust* (3), they were entitled to share in the property. Then in reply *Dorin* v. *Dorin* (4) was referred to, and the Vice-Chancellor says this (5): "I do not think that the case of *Occleston* v. *Fullalove* and other cases of the same class, apply to a case like the present. That case was the case of a father or reputed father of children. The case of *Dorin* v. *Dorin* clearly shews that the word 'children' must be taken to mean legitimate children, as much as if the word 'legitimate' had been introduced before it, and that it cannot in cases like the present be construed to include illegitimate children. Therefore the petitioner, the legitimate child, is entitled to the whole of the property after the payment of all the costs of the petition."

Now, in the first place it is to be observed on that case that the case of *Hill* v. *Crook* (6) was not cited. It is impossible to suppose that the Vice-Chancellor was not well aware of *Hill* v. *Crook* and what it decided. Still it was not cited and brought before him. In the next place it is not said positively one way or the other in the report whether the testator was aware of the fact that *James Hicks* and his daughter *Ann* had not been married at the date of the will. That of course is a most important point, because unless the Court is satisfied that the testator knew that the person whom he designates as wife was not in fact the wife, you cannot arrive at the conclusion that he was using the word "wife" otherwise than in its legal meaning. If the Vice-Chancellor was not satisfied (which I think, looking at the way in which it was argued on behalf of the respondents must have been the case) that the testator knew that the marriage had not taken place between his daughter

(1) Law Rep. 9 Ch. 147.
(2) Ibid. 16 Eq. 239.
(3) Ibid. 17 Eq. 345.
(4) Law Rep. 7 H. L. 568.
(5) 1 Ch. D. 283.
(6) Law Rep. 6 H. L. 265.

STIRLING, J. and *James Hicks*, then his decision in that case does not conflict in any way with *Hill* v. *Crook* (1).

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But if that was not the conclusion arrived at by the Vice-Chancellor, then with all respect it appears to me that the case of *Dorin* v. *Dorin* (2) can hardly be said to govern it, because clearly in the case of *In re Ayles' Trusts* (3) there was a circumstance which did not exist in *Dorin* v. *Dorin*, namely, that at the date of the will the person described as the wife was not in fact the wife of *James Hicks*, the person referred to in the will; whereas in *Dorin* v. *Dorin* it is perfectly clear that she was the wife and was properly so described, and that no inference could be drawn from the use of the words.

Upon the whole I think the proper mode of treating the case is to say that the Vice-Chancellor could not have been satisfied that the testator was aware that *James Hicks* and his daughter were living together as man and wife though not married, and therefore did not think it necessary in that case to apply the same criteria which in *Hill* v. *Crook* were applied by Lord *Cairns* to the construction of the will.

Then in the case of *Ellis* v. *Houstoun* (4), which was a decision of Vice-Chancellor *Malins*, the testatrix gave a sum of stock to trustees to pay the dividends to her brother *Charles* and his wife *Elizabeth* for their lives, and after the decease of the survivor the capital to be divided between all the children of her brother. The brother had three children by his first wife, two children by his second wife *Elizabeth* before marriage, and one child after marriage, and these were facts well known to the testatrix, who promised, as the claim alleged, that if he married his wife *Elizabeth*, she would provide for all his children by her, and she in fact treated all the children equally as her nephews and nieces, and it was further alleged that the testatrix gave instructions that her will should be so drawn as to provide equally for both classes of children. It was there held upon demurrer that the illegitimate children must be excluded from the bequest, and that the words of the will being distinct no extrinsic evidence could be received to shew what the intention of the testatrix was. In that case, as

(1) Law Rep. 6 H. L. 265.
(2) Ibid. 7 H. L. 568.
(3) 1 Ch. D. 282.
(4) 10 Ch. D. 236.

in *In re Ayles' Trusts* (1), there was a legitimate child, and upon an examination of the case of *Ellis* v. *Houstoun* (2) it appears to me that the Vice-Chancellor came to the conclusion in that case that the legitimate and illegitimate children could not take together. The Vice-Chancellor thus deals with the case of *Hill* v. *Crook* (3). He says (4): "That case was very much relied upon. There, there were no legitimate children to answer the description. The circumstances were peculiar. The testator had two daughters, one of whom had been the wife of *Crook*. She died, and the husband then married his late wife's sister, that is, another daughter of the testator, with his approbation. By his will the testator called *Crook*, who had married the two daughters in succession, his son-in-law. No doubt he was the testator's son-in-law, because he legitimately and properly married his first daughter; but the Court of Appeal and the House of Lords came to the conclusion that, under the extraordinary circumstances of that case, there being no legitimate child to answer the description (and I am perfectly satisfied that if there had been a legitimate child to answer the description the illegitimate children would have been excluded) the Court was warranted, under all the existing circumstances, in ascertaining what was intended. Therefore that was a case in which the illegitimate children took, because there was no legitimate child to answer the description." I am not sure that that is in accordance with the judgments which were delivered in the House of Lords. Then again he refers to *In re Ayles' Trusts* "which" (he says) "is the same as *Dorin* v. *Dorin* (5). That is a remarkable case, and the Vice-Chancellor in my opinion most properly held that inasmuch as there was a legitimate child to answer the description illegitimate children could not take." That is the view which he takes of *In re Ayles' Trusts*, and if it was decided on that ground of course it does not apply to the present case, because in the present case there are no legitimate children who could possibly take. Then, as I read the case, the *ratio decidendi* is expressed in the last few words of the Vice-Chancellor's judgment (6). "I think, as far as I am concerned, the law must

(1) 1 Ch. D. 282.
(2) 10 Ch. D. 236.
(3) Law Rep. 6 H. L. 265.
(4) 10 Ch. D. 243.
(5) Law Rep. 7 H. L. 568.
(6) 10 Ch. D. 246.

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be considered as now thoroughly settled, that in all bequests to classes of children where there are two classes, you cannot admit parol evidence to let in illegitimate children to share in the estate."

In the present case there are not two classes of children. There are only the illegitimate children; and, therefore, whatever weight is to be attached to the judgment of the Vice-Chancellor in *Ellis* v. *Houstoun* (1), it certainly does not in principle affect the decision in the present case.

Upon the whole, therefore, it appears to me that there is no authority which stands in the way of applying that which I think is clearly laid down by Lord *Cairns* and by the House of Lords in *Hill* v. *Crook* (2), and although the circumstances which shew an intention on the part of the testator to include illegitimate children are not so numerous in the case of this will as in *Hill* v. *Crook*, yet in my opinion there are sufficient, and I accordingly hold that the illegitimate children are entitled under the bequest.

W. Pearson, Q.C., and *Humber*, for *Thomas Horner*:—

The remaining question is as to the meaning of the word "representatives" in the gift. *Primâ facie* that word no doubt means "executors and administrators," but here the context, *i.e.*, the distributive words in the gift itself "unto, between, and amongst," and "share and share alike;" and the proviso at the end of the gift that the "representatives" are only to take the deceased child's share, coupled with the fact that in another part of the will the testator aptly uses the words "executors and administrators," shew that the word "representatives" must here mean either "next of kin," or "descendants," and which of the two it is, is not in this case material: *Walker* v. *Marquis of Camden* (3); *Lyon* v. *Coward* (4); *Horsepool* v. *Watson* (5); *Styth* v. *Monro* (6); *Atherton* v. *Crowther* (7).

Ingle Joyce, for *The Attorney-General*:—

There is nothing in this will to prevent the word "representatives" as used in the gift from being construed according to its

(1) 10 Ch. D. 236.
(2) Law Rep. 6 H. L. 265.
(3) 16 Sim. 329.
(4) 15 Sim. 287.
(5) 3 Ves. 383.
(6) 6 Sim. 49.
(7) 19 Beav. 448.

proper legal meaning of "executors and administrators." The distributive words relied on are applicable to the "children," and create a tenancy in common between them, but do not apply to the "representatives": *Attorney-General* v. *Fletcher* (1); *Hodges* v. *Grant* (2); *King* v. *Cleaveland* (3).

STIRLING, J.:—

With respect to the word "representatives," which the testator has used, I think that it does not mean legal personal representatives. It is not necessary for me to go beyond that. It is contended that the word "representatives" here means "executors and administrators," and such *primâ facie* is the meaning of the word; but nevertheless it is a flexible term, and that construction gives way to indications of intention on the part of the testator that the *primâ facie* meaning is not that which ought to be attributed to it. In the first place, we find here that the gift is to pay and divide the said third part unto, between, and amongst "all his children who shall be living at the time of his decease, and the representatives of such of them as may have died in his lifetime who shall have attained the age of twenty-one years, equally, share and share alike." Stopping there, I think that if the word "children" had been used instead of "representatives," I should have been obliged to come to the conclusion that the grandchildren of the testator were meant to take *inter se* as tenants in common. In that way you give effect to every word in the will. There are double words of distribution—first, "to pay and divide unto, between, and amongst," which words are of themselves sufficient to create a tenancy in common, and then you have a second set of words, "equally, share and share alike"—and upon the ordinary principles of interpretation which have been applied in *Attorney-General* v. *Fletcher*, and other cases of that class, if the word "children" had occurred instead of "representatives" the grandchildren would take as tenants in common. But it does not stop there. The testator goes on: "But so nevertheless that the representative or representatives of such of them so dying shall take

(1) Law Rep. 13 Eq. 128. (2) Law Rep. 4 Eq. 140.
(3) 4 De G. & J. 477.

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only the share to which the deceased child would have been entitled had he or she survived the said *William Horner*." If we read "representative," or "representatives" as executors or administrators, then, as it could not be contended that the executors and administrators were meant to take beneficially, the whole of that clause would be complete surplusage. It would express nothing more than that which the law would imply without any such language on the part of the testator, and, in fact, the whole of the words beginning "equally, share and share alike," down to "the said *William Horner*," would have no independent meaning to be attached to them.

Under these circumstances, it being the ordinary rule to give as far as may be effect to all the words of the will, and there being nothing to shew to my mind that such a construction of the will is open to objection it seems to me that I ought to hold that "representatives" does not mean legal personal representatives. It may mean either the next of kin or the descendants, but it does not appear to me to be necessary to decide which, because in this case there are neither next of kin nor descendants. Therefore, the class to take consists solely of one person, namely, of one child, and the whole goes to that one child.

Solicitors: *Eagleton & Son; Sewell & Edwards; Hare & Co.*

W. W. K.

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In re A. W. HALL & Co., LIMITED.

Limited Company—Winding-up—Contributory—Fully paid-up Shares—Non-registration of Contract — Constructive Notice — Companies Act, 1867 (30 & 31 *Vict. c.* 131), *s.* 25 [*Revised Ed. Statutes, vol. xv., p.* 628].

In October, 1881, a company was formed, as stated in the memorandum of association, with the object of purchasing the business of *A. W. H. & Co.*, for, *inter alia*, a sum to be paid in fully paid-up shares.

N., who was *A. W. H.'s* solicitor, prepared the memorandum and articles of association, and to some extent acted as the solicitor of the company. The shares were duly allotted, and certificates for them were issued to *A. W. H.*; which stated that the full amount had been paid up thereon; but the contract under which the shares were issued was not registered.

In January, 1882, upon the marriage of a Miss *H.*, *A. W. H.*, who was indebted to her, gave a bond to the trustees of her marriage settlement, of

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whom *N.* was one, to secure the debt, which bond formed part of the settled property; and *A. W. H.* also, as a collateral security, deposited with the trustees the certificates for some of his paid-up shares. *N.* prepared the bond and the memorandum of deposit.

In 1885 the deposited shares were transferred to the trustees, and fresh certificates were issued to them, which also bore the statement that such shares were fully paid up.

The company was afterwards ordered to be wound up, and the liquidator applied to enforce against the trustees a call upon the shares standing in their names.

According to the evidence *N.* did not know that the particular shares deposited with the trustees were vendor's shares, and the other trustees relied on a statement made by him to them that such shares were fully paid up:—

Held, first, following *Burkinshaw* v. *Nicolls* (1), that as the certificates of the shares in question contained a statement by the company that such shares were fully paid up, the onus of proving that the trustees had notice that they were not fully paid lay on the liquidator; and

Held, secondly, that *N.* had not been guilty of gross or culpable negligence in omitting to inquire whether the shares in question were not vendor's shares, or whether the contract had been duly registered, and consequently that the trustees were not liable for the call.

THIS company was registered in October, 1881, with a capital of £50,000, divided into 100 shares of £500 each, and the memorandum of association stated that the objects for which the company was established were to purchase from Messrs. *A. W. Hall* and *T. A. F. Hall*, then carrying on business as chemical manufacturers at *Redbridge* and *Southampton*, under the firm of "*A. W. Hall & Co.*" the goodwill of such business and the land at *Redbridge* on which the same was carried on, with the plant and fixtures in and about the same, for the sum of £22,000, "to be paid for with twenty-three fully paid-up shares and thirty (£350 paid) in the company," and also to purchase at a valuation the trade utensils and stock-in-trade on the premises, and to carry on the business.

The material provisions of the articles of association were as follows:—

"4. Two shares shall be issued to *A. W. Hall* as fully paid up, and one share shall be issued to *T. A. F. Hall* as fully paid up, for the purchase of their estate and interest in the land at *Redbridge* in the county of *Hants*, whereon the works of the business

(1) 3 App. Cas. 1004.

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mentioned in the memorandum of association are erected, or which is held by the firm of *A. W. Hall & Co.* in the same memorandum named, and the buildings erected thereon, fifteen shares shall be issued to the said *A. W. Hall* as fully paid up, and also twenty-one shares (£350 paid); and five shares shall be issued to the said *T. A. F. Hall* as fully paid up, and also nine shares (£350 paid) for the purchase of the goodwill of the said business, and the plant, machinery, tanks, cisterns, chambers, kilns, and other effects used in and about the same" (except certain items to be purchased at a valuation as therein mentioned). "The directors may at first issue such proportion of the shares as they think desirable, and may at any time or times afterwards issue the remainder, or any part or parts thereof, to such persons as they shall think fit."

"5. If several persons are registered as joint holders of any share, any one of such persons may give effectual receipts for any dividend payable in respect of such share, and on the death of any one or more of such joint holders the survivors or survivor shall be the only persons recognised by the company as having any title to or interest in such share."

By clause 7 the directors were empowered, except as to the twenty-three shares to be issued as fully paid up under the 4th clause of those articles, and any shares to be issued as fully paid as thereinafter mentioned, to require on the first issue of shares a sum not exceeding £350 per share to be paid on allotment, and to make such further calls as therein mentioned, and the directors were also empowered to issue any number of shares as fully paid up to any person willing to accept the same at any price not below par value in payment or part payment for any goods supplied or services rendered to or for the company.

By clause 10 the directors were authorized to receive from any member willing to advance the same all or any part of the moneys due upon the shares held by him beyond the sums actually called for.

In pursuance of the agreement for purchase stated in the memorandum of association, twenty-three fully paid-up shares were duly allotted to the Messrs. *A. W.* and *T. A. F. Hall* in the proportions mentioned in the articles. Of these Nos. 1 to 17

were allotted to Mr. *A. W. Hall*, and certificates of these seventeen shares were issued to him, each of which bore date the 22nd of October, 1881, and contained the statement that the full amount was paid up thereon. No cash was paid in respect of any such shares, and no contract as to the sale of the business and payment of the purchase-money in shares was ever filed with the Registrar of Joint Stock Companies in compliance with sect. 25 of the *Companies Act* of 1867, except in so far as the filing of the memorandum of association referring to such contract amounted to a filing of such contract.

In the month of January, 1882, a marriage was contemplated between Dr. *E. J. Franklyn* and Miss *M. E. H. Hall*, and Mr. *A. W. Hall*, being indebted to Miss *M. E. H. Hall* in the sum of £1250, gave a bond to the trustees of the marriage settlement in order to secure that amount and interest, and also executed an agreement whereby, after reciting that he was indebted to the trustees in the sum of £1250 and had given his bond for the repayment of the same with interest, and that he was the holder of three fully paid-up shares for £500 each in the above-mentioned company, and that in pursuance of an agreement in that behalf he had deposited the certificates for the said shares with the trustees of the marriage settlement for the purposes thereinafter mentioned, it was declared that such certificates were so deposited with the trustees as a collateral security for the £1250 and interest, and that in case default should be made in payment upon the day therein specified it should be lawful for the trustees to require him, the said *A. W. Hall*, to execute an assignment of the said shares, and he thereby undertook to execute such assignment accordingly. The settlement, bond, and agreement all bore date the 27th of January, 1882; and the settlement assigned the property described in the schedule thereto, which comprised (together with other property) the aforesaid bond, securities, and agreement, to the trustees, to be held by them upon the trusts of the settlement.

These trustees were Mr. *C. C. Neilson*, Mr. *H. Cheyne*, and two gentlemen named *T. P. Franklyn* and *H. Monkton*. The marriage took place, and the certificates for the three £500 shares were

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deposited with Mr. *C. C. Neilson* on behalf of the trustees. The shares specified in the certificate were numbered 1, 2, and 3.

Mr. *C. C. Neilson*, who was a solicitor practising in *London*, was the solicitor of Mr. *A. W. Hall* before the formation of the company, and acted also as solicitor in the transfer of the business of Messrs. *Hall* to the company and in the preparation of the memorandum and articles of association. He was also the solicitor to Dr. and Mrs. *Franklyn's* trusts, and prepared the above mentioned agreement for a deposit.

The £500 shares of the company were subsequently converted into £100 shares. The original share certificates were cancelled, and in March, 1883, new certificates were issued in the name of Mr. *A. W. Hall*, and of these fifteen were deposited by Mr. *A. W. Hall* with the trustees of the settlement in exchange for the original certificates which had been given up. Shortly afterwards Mr. *A. W. Hall* deposited with Mr. *C. C. Neilson* the certificates of two other fully paid-up £100 shares by way of further security.

All the certificates for these shares stated that the shares specified therein were fully paid up.

In September, 1885, Messrs. *Franklyn* and *Monkton* had ceased to be trustees of the settlement, and Mr. *A. W. Hall* executed to the then existing trustees, who were Mr. *C. C. Neilson*, Mr. *Cheyne*, and Mr. *F. R. Thompson*, a formal transfer dated the 2nd of September, 1885, of the seventeen shares which had been so deposited with the trustees, and three new certificates for these shares were issued in the names of the trustees, one for ten shares Nos. 1 to 10, one for two shares, Nos. 41 and 42, and the third for five shares, Nos. 81 to 85, and the transfer to the trustees was duly registered. These certificates were in the following form: "This is to certify that *H. Cheyne, C. C. Neilson, F. R. Thompson*, Esquires, are the proprietors of —— shares of £100 each, numbered —— to —— inclusive, in the above company, subject to the rules and regulations of the said company for the time being, and that £100 per share has been paid in respect of such shares."

On the 12th of October, 1885, resolutions were passed for the

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voluntary winding-up of the company, and on the 7th of November, 1885, an order was made that the voluntary winding-up should be continued under the supervision of the Court.

The liquidator now applied in the winding-up to enforce against Messrs. *Cheyne, Neilson,* and *Thompson,* as the joint registered owners of seventeen shares in the company, the payment of calls to the amount of £1445. The trustees filed affidavits in opposition to the application, and were cross-examined. Messrs. *Cheyne* and *Thompson* stated that they accepted the shares in reliance upon the statements made by Mr. *Neilson* that they were fully paid up, and maintained that no liability attached to them. Mr. *Neilson* stated in cross-examination that he acted as solicitor to Mr. *A. W. Hall* before the formation of the company; that he also acted as solicitor in connection with the transfer of the business of Messrs. *Hall* to the company; that the memorandum and articles were prepared by him personally; that he continued to act partly as solicitor for the company after its formation, but that he did not know much of what was going on in the company and attended no board meetings or shareholders' meetings; that he did not know that the particular shares received by the trustees were shares received by Mr. *A. W. Hall* for the purchase of his business; that he knew the company was working the business, and had no doubt that the sale to the company was carried through; and that he never thought about the question one way or the other whether such shares were part of the consideration of the sale. In re-examination he stated that he knew that Mr. *A. W. Hall* was to take shares as his purchase-money for the sale of the business, but did not know whether or not the provisions necessary for making the shares to be issued to Mr. *A. W. Hall,* as part of his purchase-money, fully paid up, had been complied with; that he did not know the numbers of the shares issued to Mr. *Hall* under his agreement; and that he told his co-trustees before they accepted the transfers that they might safely execute the transfers as the shares were fully paid up and there was no liability.

There were in evidence certain bills of costs from which it appeared that Mr. *Neilson's* firm had acted from time to time as solicitors for the company, and that the annual statements of accounts were filed by them.

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Hastings, Q.C., and *Kirby*, for the liquidator, in support of the summons:—

Mr. *Neilson* from his connection with the company had notice of many matters which should have put him on inquiry whether these shares were not vendor's shares, *i.e.*, shares issued to *A. W. Hall* in payment of part of the purchase-money of the property sold by him to the company, and whether any contract for sale had ever been filed with the Registrar of Joint Stock Companies in compliance with sect. 25 of the *Companies Act* of 1867. There were no other shares paid up besides the Messrs. *Hall's*, and under the circumstances Mr. *Neilson* was not entitled to rely upon the statement in the certificates that the shares were fully paid up, and cannot claim *Burkinshaw* v. *Nicolls* (1) as a decision in his favour. There is no evidence that he believed that the shares had been paid up in cash under clause 10, or that any contract had been registered, and Messrs. *Cheyne* and *Thompson* his co-trustees, who relied on what he stated, are in no better position than he is: *In re Vulcan Ironworks Company* (2).

Robinson, Q.C., and *G. T. Millar*, for the trustees:—

It was decided in *Burkinshaw* v. *Nicolls* that where the certificates for shares shew that they are fully paid up, the onus of proof that the holder had notice that they were not fully paid up lies upon those who allege such notice. Here no such notice has been proved, and the trustees are protected by that decision. The principle of constructive notice has never been carried so far as the liquidator seeks to carry it in this case; and that the modern tendency is to restrict and not to extend the doctrine of constructive notice is shewn by the *Conveyancing Act*, 1882, s. 3. In *In re Vulcan Ironworks Company* the person who was placed on the list of contributories was a director, and no certificate was ever issued stating that the shares were fully paid up until that issued to *Lee* himself, and there was no representation made by the company which they were liable to make good that the shares had been paid in cash. The liability of joint owners is a joint liability, and if any one of them is entitled to relief from liability,

(1) 3 App. Cas. 1004. (2) W. N. 1885 p. 120.

they are none of them liable: *Maxwell's Case* and *Hill's Case* (1); *Smith's Case* (2). STIRLING, J. 1887 In re A. W. Hall & Co.

Upon the question whether the reference to the contract for sale in the duly registered memorandum of association was a sufficient registration of the contract, they referred to *Pritchard's Case* (3); *Crickmer's Case* (4); *In re Appletreewick Lead Mining Company* (5). They also cited *In re Rotheram Alum and Chemical Company* (6).

Hastings, in reply.

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By way of defence it is alleged that the trustees acted on the faith of the representation contained in the certificates shewing that the shares were fully paid up, and that their case comes within the decision of the House of Lords in *Burkinshaw* v. *Nicolls* (7). That case certainly proves two things; first, that where a share, the certificate for which has upon the face of it a representation by the company that the whole amount of the share is paid up, is dealt with in the ordinary course of business, it is not necessary for the person who takes it to disregard the assertion of the company, and satisfy himself that the representation is true and that the money has been actually paid; and secondly, that if it is alleged that the person so taking the share had notice that the share had not actually been paid up, the onus of proof lies on those who assert that he had such notice—accordingly in this case that onus lies on the liquidator.

In order to shew this the liquidator relies in the first place on certain bills of costs delivered by the firm of which *Neilson* was a member, by which it is proved—and the fact is not in dispute—that he acted as solicitor in the formation of the company and prepared the memorandum and articles; and he also relies upon the dates of the certificates which were handed to *Neilson* and the numbering of the shares to which they refer. [His Lordship then

(1) Law Rep. 20 Eq. 585.
(2) 11 Ch. D. 579.
(3) Law Rep. 8 Ch. 956.
(4) Law Rep. 10 Ch. 614.
(5) Ibid. 18 Eq. 95.
(6) 25 Ch. D. 103.
(7) 3 App. Cas. 1004.

STIRLING, J. referred to the memorandum and articles, the bills of costs, and the evidence of *Neilson*, and resumed:—]

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The burden of proof being upon the liquidator, it is contended on his behalf that *Neilson* had notice of matters which put him on inquiry as to whether these shares were not shares issued to *Hall* in consideration of the transfer of the property which he sold to the company, and as to whether a proper contract had been filed with the Registrar of Joint Stock Companies.

I do not think that I can place much reliance upon the form of the certificates. The original certificates were dated the 22nd of October, 1881, the day after the registration, and two of the shares specified therein were numbered 1 and 2; and it is sought to be inferred from that that *Neilson* ought to have known that the shares were issued in fulfilment of the contract contained in the memorandum of association. But the point was not put to him in cross-examination, and I think that it would be going too far to fix him with such notice from the forms of these certificates.

It must be inferred that he knew of the contract of sale, and that he knew that it was carried through; and I think it must be inferred from that that he knew that *Hall* received shares in consideration of the transfer of his property to the company, and that they were issued as fully paid up. On the other hand, he states distinctly that he did not know that these particular shares were shares given to *Hall* in consideration of the transfer of the business.

Upon that it is to be observed that *Neilson's* evidence has not been in any way discredited. No imputation is made upon his honesty, either as a witness or as regards his acts when he took the shares: nor is it contended that when he took the shares he wilfully shut his eyes and abstained from all inquiry.

What is the law applicable to this state of facts? I think it cannot be better stated than it has been by Lord *Cranworth*, in the case of *Ware* v. *Lord Egmont* (1), where, after stating his concurrence in what had on many occasions fallen from Judges of great eminence on the subject of constructive notice: namely, that it was highly inexpedient for Courts of Equity to extend

(1) 4 D. M. & G. 460.

the doctrine, he says (1): "Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also, that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence. It is obvious that no definite rule as to what will amount to gross or culpable negligence, so as to meet every case, can possibly be laid down." The question which I have to decide in the present case is, whether or not *Neilson*, in acting as he did, was guilty of gross and culpable negligence, or whether he simply abstained from obtaining information which he might by prudent caution have obtained. I do not think that I ought to hold him guilty of gross or culpable negligence; and after mature consideration I have come to the conclusion that the application of the liquidator must fail; but I think that this is a case which has been properly brought into Court, and that there ought to be no order as to costs, except that the liquidator will take his out of the assets of the company.

Solicitors: *Saunders, Hawksford, Bennett, & Co.*; *Ashurst, Morris, Crisp, & Co.*

(1) 4 D. M. & G. 473.

W. W. K.

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37 Ch. D.

In the Second Series,
20 Q. B. D. 13 P. D.

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ADVANCEMENT—*continued.*
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as proposed, but adding a clause that a bond should be given by the Defendants for payment of the money. The Court afterwards approved the agreement signed by the Defendants, and annulled the bankruptcy:—*Held*, in an action by the trustee against the Defendants for specific performance of their agreement, that the creditors not having accepted the scheme proposed in the form in which the Defendants had agreed to it, there had been no approval of the scheme by the Court, and the agreement could not be enforced against the Defendants. Lucas *v.* Martin [C. A. 597

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person or persons whom you may designate for that purpose, the legal estate in the property to which this security relates."—The memorandum did not contain any acknowledgment of any specific debt, nor any covenant or agreement by the company for payment, except so far as the same was implied in the agreement to execute a legal mortgage of the property. The company were not the owners of the surface of the land under which the beds of coal and fire-clay led, but they had the right to use the surface for the purpose of working the minerals, and they had erected on the surface certain trade machinery of the kind excluded by sect. 5:—*Semble*, that the memorandum was not a "debenture" within the meaning of sect. 17 of the Bills of Sale Act of 1882.—*Edmonds* v. *Blaina Furnaces Company* (36 Ch. D. 215) observed upon.—And *held*, that the assignment of the trade machinery did not require registration. TOPHAM *v.* GREENSIDE GLAZED FIRE-BRICK COMPANY - - 281

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See DISTRIBUTIONS, STATUTE OF.

—— *Megson* v. *Hindle* (15 Ch. D. 198) considered - - - - 695
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—— *Midland Railway Company* v. *Haunchwood Brick and Tile Company* (20 Ch. D. 552) approved - - - - 386
See RAILWAY COMPANY. 2.

—— *Mudford's Claim* (14 Ch. D. 634) questioned
See COMPANY. 6. [191

—— *Newstead* v. *Searles* (1 Atk. 265; West, Ch. 287; 9 App. Cas. 320, n.) distinguished - - - - 32
See VOLUNTARY SETTLEMENT. 1.

—— *Plaskynaston Tube Company, In re* (23 Ch. D. 542) disapproved - - 191
See COMPANY. 6.

—— *Redington* v. *Redington* (3 Ridg. P. C. 106) distinguished - - - 683
See ADVANCEMENT.

—— *Roddam* v. *Morley* (1 De G. & J. 1) considered
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—— *Salter* v. *Edgar* (W. N. 1886, p. 47) followed
See MORTGAGE. 3. [42

—— *Savile* v. *Couper* (36 Ch. D. 520) considered
See TRUSTEE ACTS. 2. [513

CASES—*continued.*

—— *Snell, In re* (6 Ch. D. 105) distinguished **88**
See Solicitor. 3.

—— *Stone* v. *Smith* (35 Ch. D. 188) distinguished
See Vendor and Purchaser. 2. [**141**

—— *Want* v. *Stallibrass* (Law Rep. 8 Ex. 175) distinguished - - - **96**
See Vendor and Purchaser. 1.

CERTIFICATES OF SHARES—Bequest of property at bank - - - **481**
See Will. 7.

CHARITY—*Will—Construction—Marshalling—Residuary Gift to Charities with Direction for Payment exclusively out of pure Personalty—"Real Estate"—Land in Colony.*] A testatrix gave all her real and personal estate to trustees upon trust to convert, and out of the proceeds pay her debts, funeral and testamentary expenses, and certain legacies bequeathed to private individuals, and directed that all such legacies should in the first instance be payable out of the proceeds of sale of her "real and leasehold estate, if any." She directed her trustees to divide the residue of her estate into three parts and pay the same to certain charities. She then directed that "the foregoing charitable legacies" should be paid "exclusively" out of such part of her pure personal estate as was legally applicable for that purpose. The testatrix had no real or leasehold estates in this country, but was possessed of land in the colony of the Cape of Good Hope (the value of which was less than the amount of the general legacies) and of pure and impure personalty:—*Held*, that the direction as to payment of the charitable legacies was in effect equivalent to a direction that the residue should consist exclusively of pure personalty, and therefore operated as a discretion to marshall for the benefit of the charities; that the general legacies were primarily payable out of the proceeds of sale of the land in the colony; and that the debts and funeral testamentary expenses and costs of action and the unpaid portion of the general legacies must be paid in the first instance out of the impure personalty, so as to leave the pure personalty, so far as possible, to constitute the ultimate residue. *In re* Arnold. Ravenscroft *v.* Workman - - - - - **637**

CHILDREN—Former marriage - - **32**
See Voluntary Settlement. 1.

—— Illegitimate - - - - **695**
See Will. 3.

CLASS—Gift to - - - - **266**
See Will. 6.

CHOSE IN ACTION—Married woman—Reduction into possession - - **622**
See Husband and Wife. 2.

COMMISSION—Trustee—Collection of rents **148**
See Trustee Acts. 1.

COMMITTEE—Lunatic—Joint committees **595**
See Lands Clauses Act.

COMPANY—*Extraordinary General Meeting—Irregularity in Board Meeting summoning General Meeting—Adoption of Agreement prior to Formation of Company—Removal of Directors.*] A meeting of directors passed a resolution to summon an extraordinary general meeting at which were to be proposed special resolutions for removing B. from the office of director, and for increasing the capital. The articles gave power to remove directors by special resolution. The only notice B. had of the board meeting was a notice given less than ten minutes before the time of holding it, and not stating the nature of the business. The notices for the general meeting were issued, and four days before the time for the meeting B., who up to that time had made no complaint of the short notice, brought his action to restrain the company from holding the meeting, on the ground that the board which summoned it was not duly constituted, as B. had not received proper notice and could not attend. The general meeting was held and passed the resolutions. Charles, J., after this granted an injunction restraining the company from confirming the resolution to remove B.:—*Held*, on appeal, that assuming the board meeting to be so far irregular that the Plaintiff might have objected and required another to be summoned, the general meeting, having been summoned, in all other respects regularly, by directors acting as a board, was competent to act.—*Harben* v. *Phillips* (23 Ch. D. 14) distinguished.—Whether, if the Plaintiff had at once complained of the short notice and required a fresh board meeting to be called, the Court would not have prevented the holding the general meeting till this had been done, *quære*.—Before the formation of the company an agreement was entered into between B. and a person as trustee for the intended company, by which it was stipulated (inter alia) that B. should be a director and should not be removable till after 1888. The 6th clause of the articles provided that the directors should adopt and carry into effect the agreement with or without modification, and that subject to such modification (if any) the provisions of the agreement should be construed as part of the articles. The agreement was acted upon, but no contract adopting it was entered into between the Plaintiff and the company:—*Held*, that treating the agreement as embodied in the articles, still there was no contract between B. and the company that he should not be removed from being a director, the articles being only a contract between the members inter se, and not between the company and B.:—*Held*, therefore, that the order for an injunction must be discharged.—Whether a stipulation that a director shall not be removable will be enforced by the Court, *quære*. Browne *v.* La Trinidad - - - - **C. A. 1**

2. —— *Inspection of Registers of Company—Injunction—Companies Clauses Act*, 1845, *ss.* 45, 63—*Companies Clauses Act*, 1863, *s.* 28.] The right given to holders of stock and debentures by the Companies Clauses Acts, 1845, ss. 45, 63, and by the Companies Clauses Act, 1863, s. 28, of inspecting the registers of a company, is not confined to an inspection of the names and addresses only of the holders of stock and debentures, may be exercised without assigning any reason for requiring inspection, and can be enforced by an injunction restraining interference by the company with the stockholder in the exercise at all reasonable times of his statutory right, without his being com-

COMPANY—*continued.*

pelled to apply for a mandamus calling upon the directors to allow inspection. HOLLAND *v.* DICKSON - - - - - - - 669

3. —— *Misrepresentation in Prospectus — "Legal Fraud"—Action of Deceit — Tramway Company—Power to use Steam—Measure of Damages.*] Where a misstatement of fact by the Defendant materially tended to induce the Plaintiff to do an act by which he has incurred damage, the Defendant may be made liable in an action of deceit, although the misstatement was not the only inducement to the act.—The Act incorporating a tramway company provided that the carriages might be moved by animal power, and, with the consent of the Board of Trade, by steam or other mechanical power. The directors, who expected that they would without difficulty obtain the consent of the Board of Trade, issued a prospectus in which they stated that by their special Act the company had a right to use steam power instead of horses. The Plaintiff took shares on the faith of this prospectus: and stated in his evidence that he was induced to take them by the statement that the company had the right to use steam power, and also by his knowledge of, and interest in, the locality, and his confidence in the character of the directors. The Board of Trade refused their sanction to the use of steam power, and the company was wound up. The Plaintiff brought an action against the directors claiming damages for their misstatement in the prospectus:—*Held* (reversing the decision of Stirling, J.), that the directors were liable for the mistatement, as it was made without reasonable ground for their believing it.—*Held*, also, that the amount of damages to be recovered by the Plaintiff was the difference between the price paid by him for the shares and the real value of the shares at the time of allotment; and that such value must be ascertained not by the market value of the shares at the time, but by the light of subsequent events, including the result of the winding-up of the company.—One of the Defendants was not present at the meeting which issued the prospectus, but a few days afterwards he received some copies of it and circulated them:—*Held*, that he had adopted the prospectus, and was liable to the Plaintiff, although the copy seen by the Plaintiff had not been supplied to him by the Defendant.—The expression "legal fraud" considered and explained. PEEK *v.* DERRY - - C. A. 541

4. —— *Transfer of Shares or Stock in Railway Company — Delivery of Transfer Deed to Secretary—Companies Clauses Consolidation Act, 1845, ss. 14, 15, 16.*] Under the provisions of the Companies Clauses Consolidation Act, 1845, a deed of transfer of shares or stock does not pass the legal interest to the transferee until it has been delivered to the secretary of the company. If he returns it because it does not comply with the requisitions of the Act it is to be considered as not delivered to him.—Trustees who held railway stock in trust for H. B. absolutely, executed a deed of transfer to him, and delivered it to the secretary of the company, who returned it because it was not properly stamped and dated. After this H. B. made a voluntary settlement purporting to include this stock. Several years afterwards the defects in the deed of transfer were supplied, and it was delivered to the secretary, who received it and registered the stock in H. B.'s name:—*Held*, that at the time of the execution of the voluntary settlement the stock was not legally vested in H. B., but that he was only equitable owner. That the voluntary settlement of it therefore was effectual, and that H. B.'s representative was bound to transfer the stock to the trustees of the voluntary settlement.—Order of Stirling, J., affirmed. NANNEY *v.* MORGAN [C. A. 346

5. —— *Winding-up — Inspection of Documents—Companies Act, 1862, s. 156.*] The power given by the Companies Act, 1862, s. 156, of ordering inspection of the books and papers of a company which is in course of winding-up is primâ facie to be exercised only for the purposes of the winding-up, and for the benefit of those who are interested in the winding-up, and will not in general be exercised for the purpose of enabling individual shareholders to establish claims for their personal benefit against the directors or promoters.—The section only applies to books and papers in the possession of the company, and does not enable the Court to decide any question of right against third parties who have the books in their possession and claim to be entitled to such possession. — Decision of Charles, J., affirmed. *In re* NORTH BRAZILIAN SUGAR FACTORIES - - - C. A. 83

6. —— *Winding-up—Paid-up Shares—Issue at a Discount—Contributory — Shareholder-Creditor—Proof—Damages — Breach of Contract—Companies Act, 1862, s. 38, sub-s. 7—Companies Act, 1867, s. 25.*] A limited company issued part of its capital in £10 preference shares at par, every present shareholder to be entitled to one preference share at 25 per cent. discount for each ordinary share held by him. Some of the shareholders took these preference shares, paid the £7 10*s.* per share, and had certificates given them stating them to be holders of shares fully paid up. No contract was registered under sect. 25 of the Companies Act, 1867. The company having been ordered to be wound up, the preference shareholders who had taken their shares at a discount were placed on the list of contributories, and calls for the unpaid £2 10*s.* per share were made on them and paid. Some of them then applied for leave to prove in the winding-up "in damages for breach of contract or otherwise in respect of the issue of the preference shares":—*Held*, by Kay, J., that if there were any claim for damages the case fell within sect. 38, sub-sect. 7, of the Companies Act, 1862, but that the Applicants could not have maintained an action for damages against the company if it had not been wound up, and could not prove for damages in the winding-up, either against other creditors, or shareholders, or the company:—*Held*, on appeal, that if the contract between the company and the shareholders was to be treated as a contract to issue fully paid-up shares, the shareholders might on finding out that the shares were not in point of law fully paid up, have rescinded the contract to take them; but as after an order to wind up there could be no rescission, the shareholders had no remedy, it

COMPANY—*continued.*

being settled by *Houldsworth* v. *City of Glasgow Bank* (5 App. Cas. 317) that a shareholder retaining his shares cannot bring an action against the company for misrepresentations by which he was induced to take them, and the Court being of opinion that no substantial distinction could be drawn for this purpose between misrepresentation and a breach of a contract that the shares should be fully paid-up shares.—*Mudford's Claim* (14 Ch. D. 634) and *Ex parte Appleyard* (18 Ch. D. 587) questioned.—*Semble*, that if the contract was to issue shares at a discount, the allottees took the shares subject to a liability to pay their nominal amount in full, and could not be exonerated from this liability even by a registered contract.—*In re Ince Hall Rolling Mills Company* (23 Ch. D. 545, n.) and *In re Plaskynaston Tube Company* (23 Ch. D. 542) disapproved. *In re* Addlestone Linoleum Company C. A. 191

7. —— *Winding-up—Paid-up Shares—Payment in Cash—Agreement to apply Debt due from Company to Shareholder in Payment of future Calls—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] K., being a shareholder in a company whose directors were empowered to receive from shareholders payments in advance of future calls, purchased a debt due from the company and requested the directors to apply a sufficient part of the debt in paying up his shares in full. The directors passed a resolution that the debt should be so applied. Nothing further was done to carry the transaction into effect, there was no entry in reference to it in the books of the company other than the minute of the resolution, nor was any contract registered as to the shares within sect. 25 of the Companies Act, 1867.—In the subsequent winding-up of the company:—*Held*, that the transaction between K. and the directors, not having been carried into effect by any entry in the books of the company shewing that the shares had been paid up, or by any other step beyond the resolution, was not equivalent to payment in cash within the last-mentioned section, and that K. was therefore liable for calls made in the winding-up in respect of the shares.—*Ferrao's Case* (Law Rep. 9 Ch. 355) distinguished. *In re* Land Development Association. Kent's Case 508

8. —— *Winding-up—Paid-up Shares—Contributory—Non-registration of Contract—Constructive Notice—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25.] In October, 1881, a company was formed, as stated in the memorandum of association, with the object of purchasing the business of A. W. H. & Co., for, inter alia, a sum to be paid in fully paid-up shares.—N., who was A. W. H.'s solicitor, prepared the memorandum and articles of association, and to some extent acted as the solicitor of the company. The shares were duly allotted, and certificates for them were issued to A. W. H.; which stated that the full amount had been paid up thereon; but the contract under which the shares were issued was not registered.—In January, 1882, upon the marriage of a Miss H., A. W. H., who was indebted to her, gave a bond to the trustees of her marriage settlement, of whom N. was one, to secure the debt, which bond formed part of the settled property; and A. W. H. also, as a collateral security, deposited

COMPANY—*continued.*

with the trustees the certificates for some of his paid-up shares. N. prepared the bond and the memorandum of deposit.—In 1885 the deposited shares were transferred to the trustees, and fresh certificates were issued to them, which also bore the statement that such shares were fully paid up.—The company was afterwards ordered to be wound up, and the liquidator applied to enforce against the trustees a call upon the shares standing in their names.—According to the evidence N. did not know that the particular shares deposited with the trustees were vendor's shares, and the other trustees relied on a statement made by him to them that such shares were fully paid up:—*Held*, first, following *Burkinshaw* v. *Nicolls* (3 App. Cas. 1004), that as the certificates of the shares in question contained a statement by the company that such shares were fully paid up, the onus of proving that the trustees had notice that they were not fully paid laid on the liquidator; and—*Held*, secondly, that N. had not been guilty of gross or culpable negligence in omitting to inquire whether the shares in question were not vendor's shares, or whether the contract had been duly registered, and consequently that the trustees were not liable for the call. *In re* A. W. Hall & Co., Limited - - - - 712

—— Debenture—Bills of Sale Act - 260, 281
See Bill of Sale Act. 1, 2.

CONDITION—Will—Residence—Forfeiture 306
See Settled Land Act. 1.

CONSIDERATION—Marriage settlement - 32
See Voluntary Settlement. 1.

CONTRACT—Rescission—Summons under Vendor and Purchaser Act - - 44
See Vendor and Purchaser. 3.

—— To take shares - - - - 191
See Company. 6.

CONTRIBUTORY - - 191, 508, 712
See Company. 6, 7, 8.

COPYHOLD—*Devolution of Trust Estate—Death of Sole Trustee—Death of Trustee between Commencement of Conveyancing and Law of Property Act*, 1881, *and passing of Copyhold Act*, 1887—*Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 30—*Copyhold Act*, 1887 (50 & 51 *Vict. c.* 73), *s.* 45.] The effect of sect. 45 of the Copyhold Act, 1887, is to repeal entirely sect. 30 of the Conveyancing and Law of Property Act, 1881, as regards copyholds, so that, if a sole trustee of copyholds had died between the commencement of the Conveyancing and Law of Property Act and the passing of the Copyhold Act, the legal estate in the copyholds, which, by virtue of sect. 30, had on his death devolved upon his personal representatives, was on the passing of the Copyhold Act divested from them, and vested in his customary heir or devisee.—But the validity of any disposition of the property made by the personal representatives before the passing of the Copyhold Act would be unaffected by that Act. *In re* Mills' Trusts - - - 312

COSTS—Disallowance for delay - - 207
See Practice. 4.

COSTS—*continued.*
—— Lands Clauses Act - - - 595
See LANDS CLAUSES ACT.
—— Lien for - - - - - 88
See SOLICITOR. 3.
—— Specific performance - - - 141
See VENDOR AND PURCHASER. 2.
—— Taxation - - - - 40, 433
See SOLICITOR. 1, 2.

COVENANT — *Lease — Restrictive Covenants — Covenant not to permit or suffer Noisome Business — Underlease—Equitable Remedy.*] The Plaintiff demised a house for a term of years to T., with a covenant that the lessee, his executors, administrators, and assigns, would not use the premises, or permit or suffer them to be used by any person for any noisome or offensive business. T. granted an underlease of the house, and the underlease was assigned to the Defendant E. E. underlet the house to M., who opened a wild beast exhibition in it. The Plaintiff brought an action against E. and his undertenant, asking for an injunction to restrain the use of the house in that manner. There was no evidence that E. had consented to the use of the house, and it appeared that after complaints had been made he had requested M. to discontinue the exhibition:—*Held*, that as against E. the action could not be maintained, he not being liable either at law or in equity for not taking active proceedings against his undertenant to prevent him from opening the exhibition.—*Haywood* v. *Brunswick Permanent Building Society* (8 Q. B. D. 403) followed. HALL *v.* EWIN - - - - - C. A. 74

CUSTOMS ANNUITY FUND—*Interest of Subscriber—"Nominee"—Nomination of a Person as Trustee—56 Geo. 3, c. lxxiii., s. 9.*] On the construction of the Act 56 Geo. 3, c. lxxiii., by which the Customs Annuity and Benevolent Fund was established, and of the rules made under the authority of that Act:—*Held*, that in appointing a "nominee" of a subscriber's interest in the fund the directors ought to be informed for what purpose the nominee is appointed and to whom the money is to be paid. This may be done by the instrument appointing the nominee or by some other instrument signed by the subscriber, or by his will.—*Semble*, a "nominee" may be a person who is intended to take as a trustee for others.—A subscriber to the fund became lunatic while in Scotland, where he died. He made a will before he became insane giving his property to legatees, but making no allusion to his interest in the fund. A curator was appointed by the Scotch Court of Session, and proved the will. The Court of Session made an order appointing the curator nominee of the subscriber's interest in the fund, "for behoof of the legatees under his will," and the directors of the fund admitted him in those terms. The directors admitted that the order had the same effect as if the subscriber, being sane, had made the nomination:—*Held*, that the order was a sufficient appointment of the nominee, and a declaration of the persons for whose benefit the sum insured was to be paid; and that the directors were bound to pay the money to the curator. URQUHART *v.* BUTTERFIELD - - - - C. A. 357

DAMAGES—Evidence of - - - 449
See TRADE NAME.
—— Issue of shares—Misrepresentation - 191
See COMPANY. 6.
—— Measure of—Misrepresentation in prospectus - - - - - 541
See COMPANY. 3.

DEBENTURE—Bills of Sale Act - 260, 281
See BILL OF SALE. 1, 2.

DEBTOR AND CREDITOR—Accord and satisfaction - - - - - 406
See ACCORD AND SATISFACTION.

DECEIT—Action of - - - - 541
See COMPANY. 3.

DELAY—Disallowance of costs - - 207
See PRACTICE. 4.

DEPOSIT—Forfeiture of - - 96, 141
See VENDOR AND PURCHASER. 1, 2.

DIRECTOR—Removal of—General meeting 1
See COMPANY. 1.

DISCLAIMER—Specification - - 118
See PATENT.

DISCOVERY - - - - 184, 234
See PRACTICE. 5, 6.

DISCRETION OF COURT—Service out of jurisdiction - - - - 215
See PRACTICE. 9.

DISTRIBUTIONS, STATUTE OF—*Administration — Personal Estate—Intestacy — Next of Kin — Grandchildren — Per Stirpes or per Capita — Statute of Distributions* (22 & 23 *Car.* 2, *c.* 10), *ss.* 3, 5, 6, 7.] A share of the residuary estate of a testatrix (a widow), which she had given by her will, lapsed. She had only two children, a son and a daughter, both of whom died before her. Three children of the son, and one child of the daughter, survived the testatrix:—*Held*, that, under the Statute of Distributions, the four grandchildren took the lapsed share, so far as it arose from personal estate, per stirpes not per capita.—Under the Statute of Distributions the division of personal estate among descendants of an intestate is always to be per stirpes.—The term "next of kindred" in sect. 7 of the statute does not include the issue of children of the intestate, but children and their descendants are all included under the term "children," which means children living at the death of the intestate either themselves or in their descendants.—*Lockyer* v. *Vade* (Barnardiston, Ch. 444) followed.—Williams on Executors (8th Ed. vol. ii. p. 1503) dissented from. *In re* NATT. WALKER *v.* GAMMAGE 517

DOCUMENTS—Inspection of—Registers of company - - - - - 669
See COMPANY. 2.
—— Inspection of—Winding-up - - 83
See COMPANY. 5.
—— Production of - - - - 234
See PRACTICE. 6.

DOMICIL—*Scotch Law—Right of Infant to choose his own Domicil—Employment in English Customs Office.*] A testator, being the illegitimate son of a Portuguese woman, was sent to Scotland when a child, and lived there till he was eighteen years of age under the control of his reputed father's

DOMICIL—*continued.*
relations there. He was sent to school in Scotland and for a short time in Germany. When eighteen, he obtained employment in the English Customs Department and went to Yarmouth and thence to London, where he remained in the same employment till he was twenty-eight, when he returned to Scotland in ill-health, and soon after became a lunatic and died without recovering his reason. While living in London he went occasionally to Scotland, where he retained apartments, in which he left his books, &c. According to the Scotch law an infant can choose his own domicil at the age of fourteen:—*Held*, that whether the law applied to an infant who had a foreign domicil of origin or not, as to which *quære*, the evidence did not shew that the testator had adopted a Scotch domicil.—*Semble*, so far as the evidence went his domicil appeared to be English. URQUHART *v.* BUTTERFIELD - - - 357

DRAIN—Connection with sewer - - 272
See METROPOLIS MANAGEMENT ACT.

EASEMENT—Way of necessity - - 490
See WAY.

EX PARTE APPLICATION—Lunatic—Interim receiver - - - - 651
See LUNATIC.

EXECUTOR—*Lease—Measure of Liability.*] An executor who takes possession of a leasehold of his testator is liable personally as assign of the lease for subsequent rent, up to the letting value of the holding. *In re* BOYES. EARL OF STRATHMORE *v.* VANE. NORCLIFFE'S CLAIM - 128

—— Right of retainer - - - 683
See ADVANCEMENT.

EXONERATION—Locke King's Act - 674, 677
See WILL. 4, 5.

FANCY WORDS—Trade-mark - - 112
See TRADE-MARK.

FIDUCIARY RELATION — Banker — Loan to customer—Repayment - - 466
See MORTGAGE. 1.

FIXTURES—Bill of sale - - - 281
See BILL OF SALE. 2.

—— Mortgage by demise - - - 64
See MORTGAGE. 2.

FORECLOSURE—Form of order - - 42
See MORTGAGE. 3.

FOREIGN JUDGMENT—According to the law of Spain a person in whose favour documents of a certain class have been executed can commence "executive" proceedings in which the defendant can only plead defences not disputing the original right of action, and the plaintiff, if successful, obtains a "remate" judgment which is an order for execution to issue for a sum of money and costs. A "remate" judgment does not preclude either party from taking "plenary" or "ordinary" proceedings as to the same subject-matter, and in such ordinary proceedings all defences are open, and neither party can set up the "remate" judgment as a res judicata, or even as giving him a primâ facie case, and the rights of the parties are not affected by it.—The plaintiff can, however, on

FOREIGN JUDGMENT—*continued.*
giving security enforce the "remate" judgment though plenary proceedings are pending:—*Held*, reversing the decision of North, J., that a "remate" judgment, as it did not, according to the law of Spain, decide the rights of the parties, was not a final and conclusive judgment which could be sued upon in this country, and did not enable the Plaintiff to maintain a suit here for administration of the estate of the Defendant in the executive proceedings, who had since died. *In re* HENDERSON. NOUVION *v.* FREEMAN - C. A. 244

FORFEITURE—Condition of residence - 306
See SETTLED LAND ACT. 1.

—— Deposit - - - - 96, 141
See VENDOR AND PURCHASER. 1, 2.

FRAUD—Fictitious bidding - - 51
See AUCTION.

—— Legal—Definition of - - 541
See COMPANY. 3.

GENERAL ORDER, August 1882, Sched. I., Part I. - - - - 40
See SOLICITOR. 1.

GENERAL WORDS—Easement - - 490
See WAY.

HEIR — Customary — Devolution of trust estate - - - - - 312
See COPYHOLD.

HUSBAND AND WIFE—*Separate Use—Restraint on Anticipation—Absolute Gift.*] Where a fund subject to a particular estate is given absolutely to a married woman with a restraint on anticipation, the restraint will not in the absence of any other ground be confined to the continuance of that particular estate.—Decision of Kay, J., affirmed. *In re Bown* (27 Ch. D. 411) distinguished. *In re* TIPPETT'S AND NEWBOULD'S CONTRACT - - - - C.A. 444

2. —— *Wife's Real Estate—Conveyance—Acknowledgment—Separate Examination—Purchase-money — Trustees — Indemnity Fund — Chose in Action—Reduction into Possession—Fines and Recoveries Act* (3 & 4 *Will.* 4, *c.* 74), *ss.* 77, 79, 80, 84, 89—*Reg. Gen.* 1834, *Rule iii.*] One of the essential purposes of the separate examination of a wife on a sale and conveyance of her real estate by herself and her husband under the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), is to ascertain whether the purchase-money is to belong to her husband or not. Accordingly, when she has acknowledged the conveyance before the commissioners and has, on being separately examined by them, refused any provision out of the purchase-money or otherwise, she must be treated as having given up to her husband all claim upon the purchase-money and as having no further interest in it either at law or in equity. This is the case even if the purchase-money or any part of it is left outstanding in trustees by way of an indemnity fund against charges on the estate; as, for instance, in the case of part being vested in trustees by a deed of declaration of trust for the purpose of keeping down an annuity originally charged on the estate and subject to which it is sold; consequently, in such a case, in the event of the wife surviving the

HUSBAND AND WIFE—*continued.*
husband, and the fund still remaining outstanding, she cannot, as against his estate, claim the fund as her chose in action not reduced into possession by the husband. The effect of a married woman's acknowledgment and separate examination under the Fines and Recoveries Act, discussed. Tennent *v.* Welch - - - - 622

ILLEGITIMATE CHILDREN - - 695
See Will. 3.

IMPLICATION — Grant — Continuous easement - - - - 490
See Way.

—— Repeal of statute - - - 661
See Statute.

INCOME—Gift to a class—Period of ascertainment - - - - 266
See Will. 1.

INDEMNITY—Trustee—Breach of trust - 329
See Trustee. 1.

INFANT—*Marriage Settlement—Disentailing Assurance — Female Infant — Omitted Property — Mistake.*] A public body took, under compulsory powers, certain freeholds at A. to a moiety of which (together with much other property) a female infant ward of Court was entitled as one of two tenants in common in tail, and they paid the purchase-moneys into Court. Afterwards, and while the ward was still an infant, proposals for a settlement upon her marriage were carried in on her behalf under the Infants' Settlement Act, 1855, in which it was stated that she was entitled as tenant in common in tail to certain specified properties, and that it was proposed to bar the entail in the lady's share in such properties, and to vest the whole of such share, except £13,000, in trustees to be held upon certain trusts. Amongst the properties so specified were included by inadvertence the freeholds at A. A settlement founded on these proposals was sanctioned by the Court, and was carried out in 1884 by a disentailing deed, and a deed of declaration of trust, both of which were approved by the Court. The freehold property at A. was included in the parcels to the disentailing deed, but no mention of the fund in Court arising from the purchase-money of this property was made, either in the proposals or in the deeds; and the disentailing deed contained no covenant for further assurances, or for the settlement of other or after-acquired property. The marriage took place, and afterwards, in 1885, the lady attained twenty-one, disentailed the fund in Court, and claimed it as being her absolute property under the Married Women's Property Act, and unaffected by her marriage settlement. In an action by the trustees of the marriage settlement to establish their title to the fund in Court:—*Held*, first, that the disentailing deed of 1884 was not effectual to bar the estate tail of the lady in the fund in Court; and *held*, secondly that although in the absence of any contract binding the lady to settle the freeholds at A., the settlement could not be rectified, yet inasmuch as both the marriage and the settlement were sanctioned by the Court upon the faith of a representation made on behalf of the lady that she was entitled in tail to a moiety of the property, the purchase-

INFANT—*continued.*
money of which was represented by the fund in Court, she was bound in equity to make good such representation, notwithstanding her infancy at the time it was made; and that having disentailed the fund in Court, and thus become the only person, besides the Plaintiffs, who could claim any interest in it, she was precluded from setting up any title to the fund in Court adverse to that of the Plaintiffs as trustees of the settlement, and that one moiety of such fund ought to be transferred to and held by them upon the trusts of the settlement. Mills *v.* Fox - - - 153

2. —— *Marriage Settlement—Marriage of Female Ward of Court—Costs of Settlement—Order for Payment out of Corpus of Settled Property.*] Ordered that the costs of a settlement of the property of a female ward of Court, made upon her marriage with the sanction of the Court, should be paid out of the corpus of the settled property. —*Anonymous* (4 Russ. 473) followed. De Stacpoole *v.* De Stacpoole. De Stacpoole *v.* Stapleton. *In re* De Stacpoole. De Stacpoole *v.* Seymour - - - - 139

—— Domicil—Scotch law - - - 357
See Domicil.

INJUNCTION—Libel - - - 170
See Practice. 7.

—— Mine near railway - - - 386
See Railway Company. 2.

—— Trade name—Newspaper - - 449
See Trade Name.

INSPECTION OF DOCUMENTS—Registers of company - - - - - 669
See Company. 2.

—— Winding-up - - - - 83
See Company. 5.

INSTALMENTS—Payment by—Land Drainage Acts - - - - - 123
See Settled Land Acts. 2.

INTEREST—Payment of—Statute of Limitations
See Limitations, Statute of. [651

JUDGMENT CREDITOR — Railway company — Receiver and manager - - 610
See Railway Company. 1.

JURISDICTION—Vendor and Purchaser Act [44, 444
See Vendor and Purchaser. 3, 4.

LANCASTER COURT — *Practice — Chancery of Lancaster Rules*, 1884, *Order* II., *r.* 4; *Order* XII., *rr.* 1, 7—*Service of Writ out of Jurisdiction*—17 & 18 *Vict. c.* 82, *s.* 8.] Order II., r. 4, of the Chancery of Lancaster Rules, which provides that "no writ of summons for service out of the jurisdiction . . . . shall be issued without the leave of the Court or Vice-Chancellor," applies to all writs for service out of the jurisdiction of the Palatine Court, whether the person to be served is or is not within the jurisdiction of the High Court.—Accordingly leave of the Vice-Chancellor, or Court, of the County Palatine for issue of the writ out of the jurisdiction must be obtained before making application to the Court of Appeal under 17 & 18 Vict. c. 82, s. 8, for leave to serve

LANCASTER COURT—*continued.*
the writ upon a person out of the jurisdiction of the Palatine Court, but within the jurisdiction of the High Court. Walker *v.* Dodds **C. A. 188**

LAND DRAINAGE ACTS—Application of capital moneys - - - - 123
See Settled Land Act. 2.

—— Charge—Priority - - - 661
See Statute.

LANDS CLAUSES ACT—*Death of one of two joint Committees—Fund to Credit of Lunacy Matter and Lands Clauses Matter—Payment of Dividends to new Committee—Petition—Costs.*] At the time of the death of one of the two joint committees of a lunatic, under an order made in 1885 in the matter of this lunacy and in the matter of the Lands Clauses Consolidation Act, 1845, the dividends on a sum of consols to the credit of those two matters, representing purchase-moneys of lands belonging to the lunatic and taken by the Metropolitan Board of Works, were payable to the two joint committees. The joint grant being vacated by the death, the survivor of the joint committees applied to be appointed sole committee, and asked that the order of 1885 might be varied and the dividends be ordered to be paid to him alone. The Master appointed him sole committee, but declined to make any order as to the dividends. The sole committee then presented a petition entitled in the matter of the lunacy and also in the matter of the Lands Clauses Consolidation Act and Board of Works, praying that the dividends both past and future might be paid to him, and served the Board of Works. At the hearing the Board contended that they were not liable for the cost of successive orders for the payment of dividends unless there had been a change in the beneficial interest.—The Court ordered the past and future dividends to be carried to the credit of the matter of the lunacy, and when so carried to be paid to the Petitioner, intimated that any future order appointing a new committee might direct payment to him of the dividends, and that as such dividends would be standing to the credit of the lunacy, the Board need not be served on the application, and ordered the Board to pay the costs of the present petition. *In re* Ryder - - - - - - **C. A. 595**

LEASE—Covenant not to suffer noisome business
See Covenant. [74

—— Fixtures—Mortgage by demise - 64
See Mortgage. 2.

—— Liability of executor of lessee - - 128
See Executor.

—— Reservation of right to obstruct light 56
See Light.

LEASEHOLDS—Locke King's Act - - 674
See Will. 4.

LEGACY—Ademption - - - 310, 525
See Will. 1, 2.

—— Charged on realty—Back rents - 48
See Administration.

LIBEL—Injunction to restrain - - 170
See Practice. 7.

LIEN—Solicitor—Charge for costs - - 88
See Solicitor. 3.

LIGHT—*Prescription*—2 & 3 *Will.* 4, *c.* 71, *s.* 3—*Reservation in Lease of Right to obstruct Light.*] A landowner granted a lease to the Plaintiff of a house and land with their appurtenances, except rights, if any, restricting the free use of any adjoining land, or the appropriation at any time thereafter of any such land for building or other purposes, obstructive or otherwise. More than twenty years after this lease the subsequent lessee of an adjoining piece of land under the same landowner commenced to build on it in such a way as to obstruct the Plaintiff's lights. The Plaintiff having brought an action and moved for an injunction:—*Held*, that the exception of any right restricting the free use of the adjoining land did not operate as an agreement or consent on the part of the lessee that the owners of the adjoining land might always have a right to obstruct the access of light to the Plaintiff's house, within the exception in the 3rd section of the Prescription Act, and, therefore, that the Plaintiff had acquired an absolute prescriptive right to the light and was entitled to an injunction. Mitchell *v.* Cantrill **C. A. 56**

LIMITATIONS, STATUTE OF—*Simple Contract Debt—Payment of Interest by Tenant for Life—Acknowledgment — Real Assets* — 3 & 4 *Will.* 4, *c.* 104—*Statute of Limitations* (21 *Jac.* 1, *c.* 16)—*Part Payment—Executor*—9 *Geo.* 4, *c.* 14—19 & 20 *Vict. c.* 97, *s.* 14.] Payment by a devisee for life of interest on a simple contract debt of his testator's is a sufficient acknowledgment to keep the right of action alive against all parties interested in remainder.—The law in regard to the payment of interest by a tenant for life on a simple contract debt stands on the same footing as that in respect of payment of interest on a specialty debt. —*Roddam* v. *Morley* (1 De G. & J. 1) discussed and considered. *In re* Hollingshead. Hollingshead *v.* Webster - - - **651**

LOCAL GOVERNMENT - - - 535
See Public Health Act.

LOCKE KING'S ACT Contrary intention 677
See Will. 5.

—— Leaseholds - - - - 674
See Will. 4.

LUNATIC—*Supposed Lunatic—Pending Application for Inquisition — Interim Receiver appointed ex parte.*] In a proper case the Court will, pending an application for an inquisition, appoint an interim receiver of the estate of the supposed lunatic, and if the case is urgent will do so upon an ex parte application. *In re* Pountain - - - - **C. A. 609**

—— Committee — Costs under Lands Clauses Act - - - - - 595
See Lands Clauses Act.

—— Next friend - - - - 420
See Partition Suit.

—— Testator—Ademption - - - 310
See Will. 2.

MARSHALLING — Gift to charity — Mortmain Act - - - - - 637
See Charity.

MEETING—Members of company—Irregularity
See Company. 1. [1

METROPOLIS MANAGEMENT ACT, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 72, 74, 76, 250—*Injunction—Nuisance — "Sewer" — "Drain" — Vesting of Sewers in District Board—Drainage of contiguous Houses by "Combined Operation" — Connection with Drain illegally made without Knowledge of Board—Liability of Board.*] The duty imposed by sect. 72 of the Metropolis Local Management Act, 1855, on a district board, to keep the sewers which are by the Act vested in them so as not to be a nuisance, is not an absolute duty, but only a duty to use all reasonable care and diligence to keep the sewers in a proper condition.—If, therefore, a drain, which was originally a private drain, has, by reason of another drain being connected with it, become a "sewer," and therefore by the Act vested in the district board, the board will not be liable for a nuisance caused by the drain, if it is shewn that the connection was made illegally without the knowledge of the board, and that before action brought they did not know, and could not by the exercise of reasonable care have discovered, that the drain was a "sewer."—*Hammond* v. *Vestry of St. Pancras* (Law Rep. 9 C. P. 316) followed. BATEMAN *v.* POPLAR DISTRICT BOARD OF WORKS - - - 272

MINE—Near railway - - - 386
See RAILWAY COMPANY. 2.

MISREPRESENTATION—Prospectus—Company
See COMPANY. 3. [541

MORTGAGE—*Bank—Loan to Customer—Transfer by Three Persons to secure Loan—Authority to sell—Transfer to Nominees of Customer.*] G., a stockbroker, who was one of three trustees and acted as broker to the trust, proposed to his co-trustees to sell B. stock belonging to the trust and re-invest in N. E. stock. The three trustees then, on the 27th of January, 1882, executed a transfer of the B. stock for a nominal consideration to two persons who were officers of a bank of which G. was a customer. G. gave the transfer to the bank as security for a loan by them to him and the transfer was registered. G., in February, 1882, paid off the loan, and on the 15th of February the bank transferred the stock to purchasers from G., and, without giving any notice to G.'s co-trustees, allowed him to receive the purchase-money. He invested it in N. E. stock in his own name. In 1883 he sold the N. E. stock and misappropriated the proceeds. Shortly after the sale of the B. stock G. had given an account to his co-trustees shewing the sale of B. stock and a re-investment in N. E. stock, and in 1884 he rendered another account in which he represented the N. E. stock as still forming part of the trust funds. In 1885 he absconded. The co-trustees remembered hardly anything about the transaction, but admitted the genuineness of their signatures to the deed of transfer:—*Held* (affirming the decision of Kay, J.), that the bank had occasioned the loss to the trust estate by allowing the purchase-money to come to the hands of G. who had no authority to receive it, and whom they had no sufficient reason for believing to have authority to receive it, and that the bank must therefore make it good at the suit of the co-trustees, although the co-trustees had been negligent in not seeing that the N. E. stock was

MORTGAGE—*continued.*
registered in the joint names of the trustees. MAGNUS *v.* QUEENSLAND NATIONAL BANK [C. A. 466

2. —— *Fixtures — Mortgage by Demise — Trade Fixtures.*] Words which in a conveyance in fee by way of mortgage are sufficient to pass trade fixtures will have the same effect when the mortgage is of leasehold property by sub-demise; but in the latter case the absolute property in such fixtures as separate chattels with the right to remove and sell will not pass to the mortgagee unless an intention to that effect is apparent on the deed.—*Hawtry* v. *Butlin* (Law Rep. 8 Q. B. 290) explained. SOUTHPORT AND WEST LANCASHIRE BANKING COMPANY *v.* THOMPSON C. A. 64

3. —— *Practice—Foreclosure—Order for delivery of Possession—Rules of Supreme Court*, 1883, *Order XVIII., r.* 2; *Order LV., r.* 5*a* (*Dec.* 1885).] An order for foreclosure absolute in a foreclosure action commenced by summons, may, as against the defendant mortgagor in possession (he having been served and not appearing) include an order for delivery of possession by him to the plaintiff, even though the summons did not ask for delivery of possession.—*Salter* v. *Edgar* (W. N. 1886, p. 47) and *Lacon* v. *Tyrrell* (W. N. 1887, p. 71) followed. BEST *v.* APPLEGATE - - 42

—— Costs—Lien for - - - 88
See SOLICITOR. 3.

—— Remuneration of solicitor - - 40
See SOLICITOR. 1.

—— Trust in settlement—Accumulations 18
See VOLUNTARY SETTLEMENT. 2.

MORTMAIN - - - - - 637
See CHARITY.

NEWSPAPER—Trade name - - 449
See TRADE NAME.

NEXT FRIEND—Partition suit - - 420
See PARTITION SUIT.

NEXT OF KIN—Per stirpes and per capita 517
See DISTRIBUTIONS, STATUTE OF.

NOMINEE—Customs Annuity Fund - 357
See CUSTOMS ANNUITY FUND.

NUISANCE—Sewer - - - - 272
See METROPOLIS MANAGEMENT ACT.

PAID-UP SHARES - - 191, 508, 712
See COMPANY. 6, 7, 8.

PARENT AND CHILD - - - 683
See ADVANCEMENT.

PARTICULARS OF CLAIM - - - 295
See PRACTICE. 8.

PARTIES—Adding plaintiff - - 648
See PRACTICE. 1.

PARTITION SUIT—*Practice—Parties—Partition Act*, 1868 (31 & 32 *Vict. c.* 40), *s.* 4—*Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 6—*Person of Unsound Mind not so found—Next Friend.*] A partition action may be brought by a person of unsound mind, not so found, by a next friend.—Order of North, J., affirmed.—*Halfhide* v. *Robinson* (Law Rep. 9 Ch. 373) distinguished.—Where, therefore, an action for sale under the Partition

PARTITION SUIT—*continued.*

Acts was brought by two tenants in common, one of whom, being stated to be of weak mind, sued by the other as his next friend, the Court being of opinion that an action in this form being primâ facie for his benefit could be maintained, refused to strike out his name as co-Plaintiff; but intimated an opinion that, at the trial, his request for sale by his next friend, assuming that the next friend could effectually make a request, could not be acted upon in the same way as a request by a person not under disability, without the Court being satisfied that the sale would be for his benefit. Porter *v.* Porter **C. A. 420**

PATENT—*Specification — Infringement — Action — Disclaimer—Motion for leave—Costs—Form of Order—Patents, Designs, and Trade-Marks Act*, 1883, *s.* 19.] In a patent action for infringement, after all the pleadings had been delivered so that nothing remained to be done but to prepare the evidence for trial, the Plaintiffs asked, under sect. 19 of the Patents, Designs, and Trade-Marks Act, 1883, for liberty to apply for leave to disclaim one of the claims of their specification.—The application was granted on the following terms:—The Plaintiffs to pay in any event the costs of the application, and the costs of action up to and occasioned by the disclaimer, except only so far as the proceedings in the action might be utilized for the purposes of the amended action. The Plaintiffs and the Defendants to be allowed to make all necessary amendments in their pleadings after disclaimer. The Plaintiffs to undertake forthwith to amend their pleadings, confining the action to the specification as amended by the disclaimer, or to consent to the action being dismissed with costs. In the event of trial all other questions of costs reserved.—*Fusee Vesta Company* v. *Bryant & May* (34 Ch. D. 458) distinguished. Haslam Foundry and Engineering Company *v.* Goodfellow - - - **118**

PAYMENT—Cheque for a smaller sum - **406**
See Accord and Satisfaction.

—— Shares—Payment in cash - - **508**
See Company. 7.

PER STIRPES—Per capita - - - **517**
See Distributions, Statute of.

PERIOD OF ASCERTAINING CLASS - **266**
See Will. 6.

PETITION—Trustee Act—Statement in - **513**
See Trustee Acts. 2.

PLAINTIFF—Adding parties - - **648**
See Practice. 1.

PORTIONS—Double portions - - **525**
See Will. 1.

POWER — *Will — Appointment — Revocation — Wills Acts* (1 *Vict. c.* 26), *s.* 27.] A testator executed a "testamentary appointment" under a general power. A month later he executed a will containing a residuary bequest, and not referring to the testamentary appointment:—*Held*, that the will operated as an execution of the power, and revocation of the testamentary appointment. *In re* Gibbes' Settlement. White *v.* Randolf [143

PRACTICE — *Amendment — Adding Person as Plaintiff — Consent — Rules of Supreme Court*, 1883, *Order* xvi., *rr.* 2, 11—*Trustee and Cestui que trust.*] The case of trustee and cestui que trust is not excepted from the general rule of Order xvi., rule 11, so as to enable the Court or a Judge, upon the application of a cestui que trust, to amend by adding his trustee as co-Plaintiff in an action in respect of the trust property, to dispense with the consent in writing of the trustee. Besley *v.* Besley - - - - **648**

2. —— *Appeal—Form of Order to prevent repeated frivolous Applications.*] Repeated frivolous applications for the purpose of impeaching a judgment having been made by the same parties, the Court of Appeal made an order prohibiting any further application without leave of the Court. Grepe *v.* Loam. Bulteel *v.* Grepe [**C. A. 168**

3. —— *Appeal—Leave to appeal after Time.*] Three of six directors sold their shares to the company and received the price out of the funds of the company. In the winding-up of the company an order was made upon the six directors jointly and severally to replace these sums, with liberty to the three who had not received them to apply as to the liability of those who had. On the last day for appealing the three who had received the sums appealed from the order, without the knowledge of the other three:—*Held*, that leave to appeal after time ought to be given to the other three. *In re* Clayton Mills Manufacturing Company - - - **C. A. 28**

4. —— *Costs—Inquiry as to Delay—Rules of Supreme Court*, 1883, *Order* lxv., *r.* 11.] The powers given by Order lxv., r. 11, of disallowing costs improperly incurred, or rendered fruitless by undue delay, are not confined to delay and costs taking place and incurred after the Orders of 1883 came into operation, but extend to all costs incurred in an action pending when the orders came into operation, which costs had not been already adjudicated upon; and these powers may be exercised by the Judge of his own motion without any request from any of the parties.—The rule extends to cases where in the ordinary course the costs are paid out of a fund, and is not confined to disallowing costs as between the solicitor and his client who has to pay them.—Orders were made before 1883 in an administration action, directing taxation of the costs of the action, but not containing any direction for their payment, nor any declaration how they were to be paid:—*Held*, that this was not such an adjudication as to the costs as would prevent the Judge who had finally to dispose of them from exercising any powers which he had as to them under or apart from the General Orders, and that he had jurisdiction to direct an inquiry under Order lxv., r. 11.—Order of Kay, J. affirmed. Brown *v.* Burdett - - - - **C. A. 207**

5. —— *Discovery — Interrogatories—Account of Profits.*] In an action to restrain the sale of goods under an alleged infringement of Plaintiff's trade-mark and claiming damages for false representations by Defendant that his goods were goods of Plaintiff's manufacture, or in the alternative an account of profits, it was ordered that the questions of fact arising in the action should

PRACTICE—*continued.*

be tried by a special jury before a Judge:—*Held*, that Plaintiff, who had not made his election between damages and profits, was not entitled, before he had succeeded in establishing his title to relief by verdict of the jury upon the questions of fact in the action, to discovery as to the sales effected by the Defendant and production of his books for that purpose. Fennessy *v.* Clark - **C. A. 184**

6. —— *Discovery—Production of Documents—Affidavit—Rules of Supreme Court*, 1883, *Order xxxi., r.* 12.] Order xxxi., rule 12, was not intended entirely to alter the principles as to production of documents, but to give the Court a discretion to refuse the discovery of them when there was no reasonable prospect of its being of any use. On an application for an affidavit of documents evidence ought not to be entered into; the Court will form its conclusion from the pleadings, but any other proceedings in the action, as, e.g., evidence used on a former occasion, may be looked at.—In an action to restrain a nuisance from sewerage works, the Plaintiffs, after notice of trial, applied for an affidavit as to documents in the possession of the Defendants relating to the matters in question in the action. Chitty, J., refused the application, on the ground that it was not to be presumed that the Defendants had documents in their possession which would be material on the question whether there was a nuisance or not. The Plaintiffs appealed, and gave notice to read the affidavits filed on an application for an interim injunction, which were about thirty in number. From three of these affidavits it appeared that there had been resolutions passed by the Defendants bearing on the question of nuisance, and a correspondence between them and the Local Government Board on their proposing an alteration in their system of sewerage:—*Held*, that Chitty, J., was right in refusing the general order asked for, but that these affidavits could be looked at on the question whether there was sufficient reason to suppose that there were no documents the production of which would be of any use, and an order was made for an affidavit limited to resolutions of the Defendants and correspondence between them and the Local Government Board.—*Held*, that the Plaintiffs ought not to have given notice to read all the affidavits, but ought to have pointed out the parts on which they meant to rely, and they were therefore ordered to pay the costs occasioned by the notice. Downing *v.* Falmouth United Sewerage Board - - - **C. A. 234**

7. —— *Injunction to restrain Libel.*] Since the passing of the Judicature Acts the Court has jurisdiction to restrain by interlocutory injunction the publication of a trade libel, but as, if it grants such an injunction, it must pronounce the publication to be libellous before it has been found so by a jury, the jurisdiction is to be exercised only in the clearest cases, where any jury would say that the matter complained of was libellous, and where if they found otherwise their verdict would be set aside as unreasonable.—The question as to granting injunctions to restrain publication in a newspaper of reports and correspondence containing unfavourable statements as to the position and solvency of a joint stock company, considered.—Injunction to restrain the publication of future articles reflecting unfavourably on a company, refused on the ground of the difficulty of granting an injunction which would not include matters that might turn out not to be libellous; and because if the injunction was granted in terms to restrain what was libellous, the question of libel or no libel would have to be tried in a very unsatisfactory way on motion to commit. Liverpool Household Stores Association *v.* Smith **[C. A. 170**

8. —— *Particulars—Rules of Supreme Court*, 1883, *Order xix., rr.* 6, 7—*Principal and Agent—Fraud.*] The statement of claim, in an action by a principal against his stockbrokers to open settled accounts, alleged fraud, and that the Plaintiff was unable to give particulars before discovery. An application by the Defendants for particulars was ordered to stand over till a statement of defence had been put in.—A defendant by delivering his statement of defence does not waive his right to particulars. Sachs *v.* Speilman **295**

9. —— *Service out of the Jurisdiction—Discretion of the Court—Res Judicata—Rules of Supreme Court*, 1883, *Order xi., r.* 1, *sub-s.* (*f*).] On an application for leave to serve a writ out of the jurisdiction it is not sufficient that the form of the action and the nature of the relief sought bring the case within Order xi. The plaintiff must shew to the satisfaction of the Court that he has a probable cause of action; and the Court in exercising its discretion will consider the facts of the case appearing on the affidavits, so far as may be necessary for that purpose.—A sum of money was paid into Court in an action in this country in which D. was the Plaintiff. D. was resident in France. This fund was the subject of litigation between D. and the present Plaintiffs in France, and judgment was given in the French Courts that D. was entitled to the control of the fund in Court subject to the liability to account to the Plaintiffs. The Plaintiffs brought an action in this country asking for an injunction to restrain D. from receiving or dealing with the fund in Court, and applied for leave to serve the writ on D. in France:—*Held*, that the French Court having decided that D. was entitled to the control of the fund, leave to serve the writ ought not to be given. Société Générale de Paris *v.* Dreyfus Brothers - - - **C. A. 215**

10. —— *Trial by Jury—Rules of Supreme Court*, 1883, *Order xxxvi., rr.* 3, 6, 7 (*a*).] The Plaintiff brought an action for redemption of shares mortgaged by him. The Defendant by counter-claim sought relief incident to his position as mortgagee, and also damages for alleged fraudulent misrepresentations made by the Plaintiff to the Defendant which affected the amount of the balance to secure which the mortgage was given. The Plaintiff applied to have the action tried with a jury, which North, J., refused:—*Held*, on appeal, that the case did not come within Order xxxvi., r. 6, so as to give the Plaintiff a right to have the action tried with a jury—that his proper course would have been to apply to have the counter-claim for damages tried separately, as a claim which could not be conveniently

PRACTICE—*continued.*
tried in the pending action, and that the appeal must be dismissed. LYNCH *v.* MACDONALD [C. A. 227
—— Citation of authorities - - - 51
See AUCTION.
—— Lancaster Palatine Court - - 188
See LANCASTER COURT.
—— Mortgage—Foreclosure - - 42
See MORTGAGE. 3.
—— Next friend—Partition suit - - 420
See PARTITION SUIT.
—— Patent suit - - - - 118
See PATENT.
—— Trustee Acts - - - - 513
See TRUSTEE ACTS. 2.
—— Vendor and Purchaser Act - 44, 444
See VENDOR AND PURCHASER. 3, 4.
—— Winding-up—Inspection of documents 83
See COMPANY. 5.

PRESCRIPTION—Light - - - 56
See LIGHT.

PRODUCTION OF DOCUMENTS - 184, 234
See PRACTICE. 5, 6.

PROMISSORY NOTE—Payment by father for son - - - - - 683
See ADVANCEMENT.

PROSPECTUS—Misrepresentation in - 541
See COMPANY. 3.

PUBLIC HEALTH ACT (38 & 39 *Vict. c.* 55), *ss.* 150, 257—*Private Road—Vendor and Purchaser.*] Leasehold houses in an urban district, abutting partly on a private road, were sold on an open contract; at the date of the sale works had been done by the local board of the district on the road under sect. 150 of the Public Health Act, 1875; the final demand for payment of the sum apportioned in respect of the premises was served after the purchase ought to have been completed:—*Held*, that the apportioned expenses became a charge on the premises at the date of completion, and as between the vendor and purchaser were payable by the vendor. *In re* BETTESWORTH AND RICHER - - - 535

PURCHASE-MONEY—Payment by father for son - - - - - 683
See ADVANCEMENT.

RAILWAY COMPANY—*Judgment Creditor—Receiver and Manager—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4.] A judgment creditor of a railway company obtained an order for a receiver and manager under sect. 4 of the Railway Companies Act, 1867. After this, another judgment creditor applied for a similar order, which was made by Kekewich, J., without prejudice to the former order:—*Held*, on appeal, that a judgment creditor gains no priority by obtaining a receivership order, that when a receivership order has been made and is in force another judgment creditor gains no benefit whatever by obtaining a similar order, and that such subsequent order ought not to be made. The second order was therefore discharged. *In re* MERSEY RAILWAY COMPANY - - C. A. 610

RAILWAY COMPANY—*continued.*
2. —— *Mines near Railway—Notice by Owner of Intention to work — Injunction — Minerals worked by quarrying—Railways Clauses Act*, 1845, *ss.* 77, 78.] An owner of minerals under or near a railway is entitled to give notice, under sect. 78 of the Railways Clauses Act, 1845, of his intention to work them, although he intends to let them and not to work them himself.—But a notice given without any real intention or probability of working or letting the minerals would be invalid, and the Court would restrain the owner from acting upon it.—Such a notice is not invalid or unreasonable merely because it includes the minerals under a long extent of railway.—The 77th and 78th sections of the Railways Clauses Act, 1845, apply to minerals worked by open quarrying as well as those which are got by underground working.—*Midland Railway Company* v. *Haunchwood Brick and Tile Company* (20 Ch. D. 552) approved. MIDLAND RAILWAY COMPANY *v.* ROBINSON - - - C. A. 386

REAL ESTATE—Charge of legacies—Back rents *See* ADMINISTRATION. [48

RECEIVER—Railway company—Judgment creditor - - - - - 610
See RAILWAY COMPANY. 1.
—— Supposed lunatic—Ex parte application 609
See LUNATIC.

RECTIFICATION—Settlement—Infant ward of Court - - - - 153
See INFANT. 1.

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See LANCASTER COURT.

SETTLED LAND ACT—45 & 46 *Vict. c.* 38, *s.* 51 —*Forfeiture Clause—Non-residence.*] A tenant for life under a will broke the terms of a condition of residence on pain of forfeiture contained in the will:—*Held*, that, no sale having been made, the forfeiture took effect, notwithstanding sect. 51 of the Settled Land Act, 1882. *In re* HAYNES. KEMP *v.* HAYNES - - - 306

2. —— *Money in Hands of Trustees*—45 & 46 *Vict. c.* 38, *ss.* 21, 22, 25, 28, 33—*Settled Land Acts (Amendment) Act*, 1887 (50 & 51 *Vict. c.* 30), *ss.* 1, 2 —*Land Drainage Charge—Application of Capital Moneys in Payment of Instalments.*] Where settled land is subject to a charge for land drainage improvements, repayable by instalments, money in the hands of the trustees of the settlement which is applicable as capital money arising under the Settled Land Act, 1882, may now, under the provisions of the Settled Land Acts (Amendment) Act, 1887, be from time to time applied in payment of such portions of the instalments as represent capital, so as to relieve the tenant for life from the payment thereof, but such money ought not to be applied in payment of such portions of the instalments as represent interest. *In re* LORD SUDELEY'S SETTLED ESTATES - - - - - - 123

3. —— *Sale of Estate by Tenant for Life—Timber at Valuation—Power to cut Timber—Claim of Tenant for Life to Proceeds of Sale of Timber—Extra Costs of dismissed Action by Remaindermen.*] A tenant for life of an estate in strict settlement had power to cut certain timber and other trees, to sell the same and to apply the produce to his own use. In 1881 he contemplated a sale of the estate, but he was restrained from selling (either under the power in the will or under that contained in the Settled Land Act) by an injunction granted in an action brought by persons entitled in remainder. In 1884 the action was dismissed with costs, and in 1885 the tenant for life sold the estate under conditions of sale which stated that the purchaser should in addition to the purchase-money pay for the timber according to a valuation. The tenant for life claimed, under the provisions of the settlement and under the Settled Land Act, 1882, s. 35, to be paid out of the purchase-money the value of the timber; and he also claimed to be paid the difference of his costs, as between party and party and solicitor and client, in the action which was dismissed:—*Held*, that the amount of the valuation of the timber was an addition to the price which the purchaser agreed to pay for the estate, and must be treated as capital money payable to the trustees under sect. 21 of the Settled Land Act, 1882, and that the claim by the tenant for life to be paid the sums asked for failed:—*Held*, also, that the tenant for life was entitled, in defending the action which was dismissed with costs, to be paid his extra costs of so much of the action as related to the exercise of the powers contained in the Settled Land Act as incidental to the exercise of his power of sale under the provisions of the Settled Land Act, 1882. *In re* LLEWELLIN. LLEWELLIN *v.* WILLIAMS - 317

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—— Ward of Court - - - 139, 153
See INFANT. 1, 2.
SEWER—Metropolis Management Act - 272
See METROPOLIS MANAGEMENT ACT.
SHARES—Issue at a discount - - 191
See COMPANY. 6.
—— Paid-up - - - 191, 508, 712
See COMPANY. 6, 7, 8.
—— Transfer—Legal interest - - 346
See COMPANY. 4.

SOLICITOR—*Bill of Costs—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, August*, 1882, *Sched. I., Part I.—Mortgage—Negotiating Fee.*] A solicitor mentioned to a borrower the name of a client of his as likely to lend. A mortgage was arranged without further action on the part of the solicitor, who then acted for both parties in the matter of the mortgage:—*Held*, that the solicitor was not entitled to a negotiating fee. *In re* ELEY - - - - 40

2. —— *Bill of Costs—Taxation—Country Solicitor and London Agent—Bill of Agency Charges—Taxation of Part of Bill—Solicitors' Act*, 1843 (6 & 7 *Vict. c.* 73, *s.* 37.] London agents delivered to a country solicitor their bill of agency charges for a year. The bill included their charges relating to a number of distinct actions and matters in which they had acted as agents for the solicitor. The charges relating to each distinct action or matter were made out separately under the head of that action or matter, though the whole of the charges were comprised in one bill:—*Held*, by North, J., that the bill thus delivered was one bill, and that the country solicitor was not entitled to have the charges relating to one of the actions taxed without having the whole bill taxed:—*Held*, on appeal, that, notwithstanding sect. 37 of the Solicitors Act, the Court under its general jurisdiction can order taxation of part of a bill, and that in this case it was right that such juris-

SOLICITOR—*continued.*
diction should be exercised, but only upon terms which would prevent any injustice being done. Taxation of the charges relating to the one action was therefore ordered, upon the appellants giving an undertaking to pay within a short limited time (subject to an undertaking to refund) the balance claimed by the agents to be due to them for charges and disbursements, and the appellants, who had not previously offered any undertaking, were ordered to pay the costs of the appeal. *In re* Johnson and Weatherall - C. A. 433

3. —— *Lien—Charge for Costs—Attorneys and Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Priority—Solicitor acting for Mortgagor and Mortgagee.*] While a suit for redemption of a mortgaged estate was pending the Plaintiff mortgaged his interest in the estate to D. The Plaintiff's solicitor in the suit acted for both parties in this mortgage. A company had given notice to take the property compulsorily, but the price had not been ascertained. On the day of the execution of the mortgage to D. the Plaintiff wrote to his solicitors and their London agents a letter directing them to pay D.'s mortgage debt out of the first money that should come to their hands from the company, and the solicitors handed this letter to D. with the mortgage deed. After this the price of the land was ascertained by arbitration, in which arbitration the London agents acted as the Plaintiff's solicitors, and the price was carried over to the credit of the redemption suit, and left a balance after paying off the original mortgage debt. After this the solicitors and their London agents applied for an order charging the fund with their costs in the action and in the arbitration. Stirling, J., made an order giving them a charge, and decided that they were entitled to priority over D.'s mortgage:—*Held*, on appeal, that the mere fact that the solicitors acted for D., as well as for the Plaintiff, in the matter of the mortgage, did not disentitle them to priority.—*In re Snell* (6 Ch. D. 105) distinguished.—But *held*, that the Plaintiff's letter was a direction to the solicitors that moneys to come from their hands from the property were to be applied in the first place in paying D., and that they having forwarded this letter to D. were bound by the direction, and could not set up a claim of their own in opposition to it, and were in no better position as to moneys in Court than as to moneys which actually came to their hands, and that their charge must be postponed to D.'s mortgage:—*Held*, also, that the London agents had no right to a charge for costs of the action, as they were not the solicitors employed by the client, nor to a charge for the costs of the arbitration, as it was not a proceeding in a Court of justice. Macfarlane *v.* Lister - - - C. A. 88

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—— Sale by auction—Fictitious bidding - 51
See Auction.

SPECIFICATION - - - - 118
See Patent.

STATUTE—*Construction—Repeal by Implication.*] The General Land Drainage and Improvement Company's Act, 1849 (12 & 13 Vict. c. xci.), and the Lands Improvement Company's Act, 1853 (16 & 17 Vict. c. cliv.) each contained a section which provided that, upon the final order or certificate of the Inclosure Commissioners and the execution of the improvements, the company should have a first charge upon the inheritance of the improved lands in priority over every other then existing or future charge. The company of 1853 having executed improvements of land already subject to a charge in favour of the company of 1849, contended that the latter charge was displaced by theirs:—*Held*, that the two sections were not irreconcilable, and that the charge which was first in order of time was entitled to priority. Pollock *v.* Lands Improvement Company - - - - 661

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27 Eliz. c. 4—*Fraudulent Conveyances* - 32
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21 Jac. 1, c. 16—*Limitations* - - 651
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22 & 23 Car. 2, c. 10, ss. 3, 5, 6, 7—*Distributions* - - - - - 517
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9 Geo. 4, c. 14—*Limitations* - - 651
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2 & 3 Will. 4, c. 71, s. 3—*Prescription* - 56
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3 & 4 Will. 4, c. 74, ss. 77, 79, 80, 84, 89—*Fines and Recoveries* - - 622
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3 & 4 Will. 4, c. 104—*Administration* - 651
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1 Vict. c. 26, s. 27—*Wills* - - 143
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6 & 7 Vict. c. 73, s. 37—*Solicitors* - 433
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8 & 9 Vict. c. 16, ss. 14, 15, 16—*Companies Clauses* - - - - 346
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12 & 13 Vict. c. xci., s. 62—*Land Drainage*
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13 & 14 Vict. c. 60, s. 32—*Trustees* - 513
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16 & 17 Vict. c. cliv. s. 51—*Land Drainage*
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25 & 26 Vict. c. 89, s. 38, sub-s. 7—*Companies*
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30 & 31 Vict. c. 69—*Locke King's Act Amendment* - - - - - 677
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30 & 31 Vict. c. 127, s. 4—*Railway Companies*
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30 & 31 Vict. c. 131, s. 25—*Companies* - 191,
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32 & 33 Vict. c. 62, s. 4, sub-s. 3—*Debtors* 104
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37 & 38 Vict. c. 78, s. 9—*Vendor and Purchaser* [44, 444
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38 & 39 Vict. c. 55, ss. 150, 257—*Public Health*
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39 & 40 Vict. c. 17, s. 6—*Partition* - 420
See PARTITION SUIT.
40 & 41 Vict. c. 34, s. 1—*Mortgage—Exoneration* - - - - - 674
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41 & 42 Vict. c. 31, ss. 4, 5, 8—*Bills of Sale*
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TRADE-MARK—*Registration—"Distinctive Device"—Colour—"Fancy words not in common use"—Patents, Designs and Trade Marks Act*, 1883, *ss.* 64, 67.] Under sect. 67 of the Patents, Designs and Trade Marks Act, 1883, a trade-mark may be registered in any colour or colours; but having regard to sect. 64, it must be a trade-mark that is distinctive independently of colour. A trade-mark of which the only distinction is colour cannot be registered. — In 1872 H., a wholesale grocer, commenced using, for French coffee, a red, white, and blue label, and in 1881 he registered it under the Trade Marks Registration Act, 1875, in Class 42, for "coffee" only. The label as registered was shaded so as to represent three colours, across it being printed the words "Red, White and Blue." After the passing of the Patents, Designs and Trade Marks Act, 1883, H. applied for the registration of a red, white and blue label (in colours) for the whole of the goods in Class 42, but the Comptroller refused to register the label as not being sufficiently distinctive.—On a motion by H. for an order on the Comptroller to proceed with the registration:—*Held*, that, having regard to sects. 64 and 67 of the Act, the label was not capable of registration as it possessed no distinctive character independently of the colours.—An application to proceed with the registration of the words "Red, White and Blue," as "fancy words not in common use" within the meaning of sect. 64, was also refused. *In re* HANSON'S TRADE-MARK - - - - - 112

TRADE NAME—*Newspaper—Injunction—Tendency to deceive—Evidence of Damage.*] Where the owner of a publication claims an injunction to restrain the issue of another publication with a similar name, he must shew not only that the assumption of the name by the defendant is calculated to deceive the public, but also that there is a probability of the plaintiff being injured by such deception.—The Plaintiff had long been the proprietor of a daily morning newspaper, called the *Morning Post*. The Defendants commenced a daily evening newspaper called the *Evening Post*. There was no evidence of any actual injury having been done to the Plaintiff by the conduct of the Defendants:—*Held* (reversing the decision of Kay, J.), that although the conduct of the Defendants in taking the name *Evening Post* might be calculated to deceive the public into supposing that there was a connection between the two papers, there was no

TRADE NAME—*continued.*
probability that the Plaintiff would be injured by such supposition; and an injunction was therefore refused. Borthwick *v.* The Evening Post - - - - - - C. A. 449

TRANSFER OF SHARES—Legal interest - 346
See Company. 4.

TRIAL BY JURY - - - - - 227
See Practice. 10.

TRUST — Accumulations for benefit of mortgagees - - - - - 18
See Voluntary Settlement. 2.

TRUSTEE—*Breach of Trust—Indemnity—Concurrence in Breach of Trust.*] A trustee who distributes a trust fund among strangers at the request of one of the beneficiaries, from whom he takes a covenant of indemnity, cannot afterwards recover under the covenant for the loss of a beneficial interest, to which he has subsequently become entitled, in the fund.—The effect of active concurrence by a person in a breach of trust upon a beneficial interest to which he subsequently becomes entitled in the trust fund considered.—A. was sole trustee of a fund held in trust for B. for life, then for Mrs. B. for life, then if she died in B.'s lifetime, in trust as she should appoint by will, and in default for her next of kin. A., at the request of B. and wife, raised £5000 out of the fund, paid £1000 to each of the four adult daughters of C., and £1000 to C. in trust for his infant daughter. B. covenanted with A. to indemnify him against "all consequences" of this distribution of the £5000. Mrs. B. died in B.'s lifetime intestate, and her next of kin were A. and C. On the death of B., A.'s representative sued B.'s representative to compel him to replace the £5000:—*Held*, by Kay, J., that the fund must be replaced.—*Held*, on appeal, that the object of the covenant was only to indemnify A. from demands against him, as trustee, for breach of trust, and that it ought not to be construed as an undertaking to make good to him any loss which he, as a beneficiary, might sustain by the diminution of the trust fund; and that since A., as next of kin, could not have made a claim against himself as trustee in respect of the breach of trust, there was no claim against A.'s estate in respect of which his representative could claim indemnity from B.'s estate so far as regarded A.'s interest as one of the next of kin:—*Held*, also, that C., having actively concurred in the distribution, could not have made any claim against A. or his estate in respect of it, even if he had not known, as the Court was satisfied he did know, that he had a possible interest in the trust fund, and that the distribution of it was a breach of trust:—*Held*, therefore, that as regarded C.'s interest as one of the next of kin, there was no claim against B.'s estate under the covenant.—The action was therefore dismissed. Evans *v.* Benyon C. A. 329

2. —— *Defaulting Trustee—Writ of Attachment*—32 & 33 *Vict. c.* 62, *s.* 4, *sub-s.* 3.] By an order of June, 1878, compromising an action brought to recover from B. moneys which he had borrowed from A. at interest, B. "by his counsel admitting that the principal sum in his hands claimed in the action amounted to £——," it was ordered in effect that he should hold £1700, part thereof, on certain trusts, and should be at liberty to retain it during the life of C., paying interest for it, and liberty was given to apply for payment of the principal and interest if default was made in payment of interest. Default having been made, B. in 1887 was ordered to pay the money into Court, and on his failing to do so leave to issue an attachment was applied for. He deposed that when the order of 1878 was made he had not in his hands any money or investments representing the sum owing from him or any part thereof:—*Held* (affirming the decision of Kekewich, J.), that although B. up to the order of 1878 was only a debtor and not a trustee, he must, having regard to his admission, be held upon the making that order to have had the money in his hands as trustee—that he therefore came within the exception in sect. 4, subsect. 3 of the Debtors Act, 1869, and was liable to attachment for non-payment. Preston *v.* Etherington. Etherington *v.* Preston [C. A. 104

—— Added as plaintiff - - - 648
See Practice. 1.

—— Appointment of—Trustee Acts 148, 513
See Trustee Acts. 1, 2.

—— Devolution of estate on death - 312
See Copyhold.

TRUSTEE ACTS—*New Trustees—Appointment by Court—Two New Trustees out of, and one within, the Jurisdiction—Real Estate—Power of Sale—Remuneration of Acting Trustee in England.*] The cestuis que trust (some of whom were infants) under a settlement of freehold farms in Wales (dated in 1840), were all resident out of the jurisdiction either in Canada or the United States. The settlement contained a power of sale exercisable with the consent of the equitable tenant for life, and a power of appointing new trustees exercisable by the surviving or continuing trustee, or the heirs or assigns of the last surviving or continuing trustee.—In 1874, when both the original trustees of the settlement were dead, the executrix of the last surviving trustee, erroneously believing herself empowered in that behalf, purported to appoint two persons resident in Canada to be trustees of the settlement. These two persons, believing themselves to be duly appointed, had acted as trustees since 1874, and had employed an English agent to receive the rents of the farms, paying him a commission for so doing. The heir of the last surviving trustee could not be found, and there was no one capable of exercising the power of appointing new trustees contained in the settlement.—Upon a petition by all the cestuis que trust for the appointment by the Court of the two Canadians and the English agent as new trustees, and for authority to pay the English trustee a commission on the rents while acting as manager and receiver, the Court appointed the two persons resident in Canada and the English agent to be new trustees of the settlement, but required an undertaking by the trustees out of the jurisdiction in case the power of appointing new trustees should become exercisable by them, or either of them, not to

TRUSTEE ACTS—*continued.*

appoint any new trustee resident out of the jurisdiction without the consent of the Court. The Court also, subject to the production of evidence as to the number of the holdings, the rents and dates of payment, the necessity of paying a commission for collecting the rents, and that the proposed remuneration was proper, sanctioned the payment of a commission to the English trustee. *In re* Freeman's Settlement Trusts - 148

2. —— *New Trustees—Appointment of separate Set of Trustees of Part of Property held upon Distinct Trusts—Practice—Petition—Reference to Sections of Acts under which Application made—Trustee Act*, 1850 (13 & 14 *Vict. c.* 60), *s.* 32—*Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 5.] Independently of sect. 5 of the Conveyancing Act, 1882, the Court has power under the Trustee Acts to allow trustees to retire from the trusts of a part of the trust property, held upon trusts distinct from those affecting the remainder, and to appoint a separate set of trustees of such part.—*Savile* v. *Couper* (36 Ch. D. 520) considered.—Petitions under the Trustee Acts should contain a statement indicating the particular sections of the Acts under which the Court is asked to make an order. *In re* Moss's Trusts - - 513

UNDERLEASE—Covenant running with land *See* Covenant. [74

VENDOR AND PURCHASER—*Rescission—Forfeiture of Deposit—Defect in Title subsequently discovered—Action to recover Deposit.*] A purchaser of land is not entitled to have the contract set aside for defect of title after completion, or after rescission consequent upon the purchaser's default.—The conditions in a contract for sale of land provided that the purchaser should pay a deposit, and that if he failed to comply with the conditions his deposit should be forfeited, and the vendors should be at liberty to resell. The purchaser paid the deposit, accepted the title and prepared draft conveyance, which was approved, but when the time for completion arrived he could not find the residue of the purchase-money. The vendors therefore rescinded the contract. Three years afterwards, on a sale to another purchaser, it was decided that the title of the vendors was bad, owing to a defect which appeared on the face of the abstract delivered to the first purchaser. The first purchaser thereupon brought an action to recover his deposit on the ground of mutual mistake and failure of consideration:—*Held* (affirming the decision of Kekewich, J. (35 Ch. D. 384)), that he was not entitled to recover the deposit.—*Want* v. *Stallibrass* (Law Rep. 8 Ex. 175) and *Hart* v. *Swaine* (7 Ch. D. 42) distinguished. Soper *v.* Arnold - C. A. 96

2. —— *Specific Performance — Judgment — Default in Completion—Declaration that Vendor entitled to forfeit of Deposit—Non-appearance of Defendant—Costs.*] In an action by a vendor for the specific performance of an agreement to purchase real estate, the purchaser having accepted the title, but having failed to complete at the time fixed, there being a condition empowering

VENDOR AND PURCHASER—*continued.*

the vendor, in case of the failure of the purchaser to comply with any of the conditions of sale, to forfeit the deposit and resell the property:—*Held*, that, in lieu of judgment for specific performance, a declaration may be made, even though the Defendant had not appeared to the writ, that the vendor was entitled to forfeit the deposit and resell the property, if the writ has claimed such a declaration in the alternative.—But *held*, that the order should direct Plaintiff to pay the costs of the action.—*Stone* v. *Smith* (35 Ch. D. 188) distinguished. Kingdon *v.* Kirk [141

3. —— *Vendor and Purchaser Act*, 1874 (37 & 38 *Vict. c.* 78), *s.* 9—*Summons—Jurisdiction—Determination of Validity of Notice to rescind Contract.*] Upon a summons under sect. 9 of the Vendor and Purchaser Act, 1874, the Court has jurisdiction to determine the validity of a notice given by a vendor to rescind his contract for sale.—Such a question is not "a question affecting the existence or validity of the contract" within the meaning of sect. 9, those words referring only to the inception of the contract. *In re* Jackson and Woodburn's Contract - - 44

4. —— *Vendor and Purchaser Act*, 1874—*Practice—Summons*—37 & 38 *Vict. c.* 78.] A married woman contracted to sell a leasehold vested in trustees for her under a will. The purchaser objected to the title on the ground that she was by the will restrained from anticipation. She took out a summons under the Vendor and Purchaser Act, 1874, to have the point decided. The Judge made an order under the Conveyancing and Law of Property Act, 1881, s. 39, binding her interest in the property, and adjourned into Court the question whether she was restrained from anticipation, directing the trustees to be served. The Court decided that she was restrained from anticipation, and that the purchase-money must not be paid to her, but to the trustees. From this she appealed:—*Held*, by the Court of Appeal, that as the question whether the purchase-money was to be paid to her or the trustees did not concern the purchaser, the Court had no jurisdiction to decide it on a vendor and purchaser summons; but the Court gave the vendor leave to amend the summons so as to make it an originating summons under Order lv., rule 3, and the proper parties being before the Court, the appeal was allowed to proceed on her undertaking so to amend it. *In re* Tippett's & Newbould's Contract - - - - - 444

—— Expense of making private road - 535
See Public Health Act.

VOLUNTARY SETTLEMENT — *Marriage Consideration—Settlement on Marriage of Widower—Limitation in favour of Children by former Wife — Subsequent Mortgagee*—27 *Eliz. c.* 4.] The principle of *Newstead* v. *Searles* (1 Atk. 265; West, Ch. 287; 9 App. Cas. 320 n.), whereby limitations contained in the marriage settlement of a widow in favour of her children by a former marriage are not treated as voluntary, will not be extended to the like limitations in the marriage settlement of a widow.—By the settlement made on the second marriage of a widower, land belong-

VOLUNTARY SETTLEMENT—*continued.*

ing to him was conveyed in trust for his children by his first wife absolutely, and personalty belonging to the second wife was settled on trusts for her benefit. The husband afterwards mortgaged the land:—*Held*, that the settlement of the land was voluntary, and therefore void as against the mortgagee under 27 Eliz. c. 4. *In re* Cameron and Wells - - - - 32

2. —— *Trust for Accumulation — Trust for benefit of Mortgagees.*] By a voluntary settlement certain freehold estates were settled, subject to the mortgages subsisting thereon, to the use of the settlor for life, with remainder to the use of trustees for 500 years, and subject thereto in strict settlement. And the trusts of the term were declared to be that the trustees should during the period of twenty-one years from the death of the settlor receive out of the rents of the estate the annual sum of £1000 and accumulate it at compound interest, and should at the expiration of that period, or from time to time during that period as they might think fit, apply the accumulated fund in satisfaction of the mortgages then charged on the estate, and should pay the surplus of the rents to the person entitled to the immediate reversion of the estate. Some years after the death of the settlor the first tenant in tail in possession barred the entail and acquired the fee simple subject to the mortgages; and he then claimed the right to stop the accumulations and to receive the accumulated fund and the whole future rents of the estate:—*Held*, that the mortgagees were cestuis que trust under the deed equally with the owner of the estate, and that he could not stop the accumulations or receive the accumulated fund without their consent.—The doctrine of *Garrard* v. *Lord Lauderdale* (2 Russ. & My. 451) does not apply to provisions for creditors which do not come into operation till after the death of the settlor. *In re* Fitzgerald's Settlement. Fitzgerald *v.* White C. A. 18

WARD OF COURT—Marriage settlement—Costs *See* Infant. 2. [139

—— Marriage settlement—Disentailing deed 153 *See* Infant. 1.

WAY—*Conveyance—General Words—Easement—Landlocked Tenement—Right of Way—Way of Necessity—Way necessary for convenient User of Tenement—Continuous and apparent Easement—Unity of Possession—Implied Grant.*] By a lease in 1877 the lessor demised to the lessee a rectangular plot of building land, A., in the corner formed by the intersection of two public roads, of which one passed along the front and the other along the side of the land.—By a lease of even date the same lessor demised to the same lessee another rectangular building plot, B., immediately adjoining A., and also facing the front road but having no direct access to the side road. Both plots abutted at the rear upon a boundary or party wall.—The lessee then built a house on each plot and laid out the ground at the back as a garden to the house, with the exception of a narrow strip at the rear of both plots, which he formed into and used as a road or back way from the house and garden, B., into the public road along the side of A. This back-way was bounded

WAY—*continued.*

on the one side by the party-wall and on the other by the garden walls of A. and B., a gate into it being made by the lessee in the garden wall of B.—The house on B. completely blocked all access from the front to the garden behind, except by a tiled passage or hall forming part of the house, with a door at each end, one door opening into the garden.—In 1878 the lessee assigned to the Defendant the whole of plot B., as described in the lease thereof, and also the house thereon, "with their rights, easements, and appurtenances." In 1879 the lessee assigned to the Plaintiff's predecessor in title the whole of plot A., as described in the lease thereof, and also the house thereon. Each assignment thus included part of the soil on which the back-way had been formed, but neither deed contained any reference to the back-way, and in particular the assignment to the Plaintiff's predecessor contained no reservation of a right of way over his portion of the soil in favour of the owners or occupiers of B.:—*Held*, that on the assignment of B. to the Defendant, a right of way over the Plaintiff's portion of the soil of the back-way into the side road passed, not as a way of necessity, but by implied grant as being in the nature of a continuous and apparent easement.—The doctrine of implied grant as applicable to easements in the nature of continuous and apparent easements, discussed. Brown *v.* Alabaster - - 490

WIDOWER—Marriage of - - - 32 *See* Voluntary Settlement. 1.

WILL—*Ademption—Bequest of Business—Double Portions.*] A testator bequeathed his residue (including a business which he directed to be sold) for the benefit of his children equally. He had two sons and three daughters. Subsequently to the date of his will he assigned the business to his eldest son on trusts, which provided for the admission of the younger son as partner on equal terms with the elder on attaining full age, the repayment with interest to the father of a sum temporarily employed by him in the business, and the payment to the father of a weekly sum of £10 for life:—*Held*, that the shares of the sons in the residue were adeemed to the extent of the value of the property assigned on trust for them at the time of the assignment, and must be brought into account in the distribution of residue. *In re* Vickers. Vickers *v.* Vickers - - 525

2. —— *Ademption—Lunacy.*] A testator bequeathed a policy on his own life on trust to pay two debts due from him, and to pay the balance of the money to be received on the policy, if any, to his daughter J. The testator paid off one debt; he became lunatic; his committee paid off the other debt:—*Held*, that J. was entitled to the money received on the policy, less the debt paid by the committee. *In re* Larking. Larking *v.* Larking - - - - 310

3. —— *Bequest to "Children"—Illegitimate Children—"Representatives."*] A testator by his will, dated in 1868, directed his trustees to pay the income of a certain share in a trust fund "to my sister Charlotte, the wife of Thomas H.," during her life, and after her death to pay and divide the share unto, between and amongst all

WILL—*continued.*

"her children" who should be living at her death, and the "representatives" of such of them as should have died in her lifetime who should have attained twenty-one, equally, share and share alike.—Charlotte never was the wife of Thomas H., he having previously to 1845 married another woman, who at the date of the will and down to his death in 1875 was his lawful wife.—In 1845 Charlotte left her home, and thenceforth cohabited with Thomas H. until he died. At the date of the will she had had four illegitimate children by him, the two survivors of whom were then living, aged respectively twenty and eighteen; and she had not had a child for seventeen years, and was presumably past child-bearing. Charlotte died in 1885. These were the only children she ever had, and only one of them survived her.—The testator was well aware of the connection of his sister with Thomas H., visited at the house where they resided, and recognised the children of his sister by Thomas H. as his own nephews and nieces:—*Held*, that the testator in describing his sister Charlotte as the "wife" of Thomas H., when he knew she was not so, and in using correlatively with that the expression "children" to describe the offspring of a woman whom he knew not to be lawfully married, had shewn that he did not use the term "children" in its strict legal sense; and that, applying the principles laid down in *Hill* v. *Crook* (Law Rep. 6 H. L. 265), the illegitimate children of Charlotte were intended, and were entitled to take under the gift in the testator's will.—*Hill* v. *Crook* (Law Rep. 6 H. L. 265) and *Dorin* v. *Dorin* (Law Rep. 7 H. L. 568) explained.—*In re Ayles' Trusts* (1 Ch. D. 282). *Ellis* v. *Houstoun* (10 Ch. D. 236), and *Megson* v. *Hindle* (15 Ch. D. 198) considered.—*Held*, also, that the word "representatives" in the gift must be construed either as "next of kin" or as "descendants," and not as "executors or administrators." *In re* Horner. Eagleton *v.* Horner - 695

4. —— *Exoneration—Bequest of Leasehold House—Contract by Testator to purchase Leasehold Reversion—Liability of Legatee to pay Purchase-money—Locke King's Act* (17 & 18 *Vict. c.* 113)—40 & 41 *Vict. c.* 34, *s.* 1.] By virtue of sect. 1 of the Act 40 & 41 Vict. c. 34, Locke King's Act now extends to leaseholds. *In re* Kershaw. Drake *v.* Kershaw - - 674

5. —— *Exoneration—Mortgage Debt—Locke King's Act* (17 & 18 *Vict. c.* 113)—*Amendment Act* (30 & 31 *Vict c.* 69)—*Contrary Intention.*] A testator directed his private debts to be paid out of the proceeds of certain life policies; he bequeathed his residue, subject to the payment of his trade debts; after the date of his will he deposited the title deeds of real estate with his bankers to secure an overdrawn trade account:—*Held*, that this amounted to a declaration of intention contrary to Locke King's Act, and that the devisee of the real estate was entitled to have it exonerated from the banker's lien. *In re* Fleck. Colston *v.* Roberts - - 677

6. —— *Gift to Class—Ascertainment of Class—Gift of Income—Period of Distribution.*] The "rule of convenience," by which in a bequest of an aggregate fund to children as a class, payable on attaining a given age, the period of ascertaining the class is the time when the first of the class by attaining the given age becomes entitled to payment, and children coming into esse after that period are excluded, is not applicable to similar bequests of income. *In re* Wenmoth's Estate. Wenmoth *v.* Wenmoth - - 266

7. —— *"My Property at R.'s Bank"—Share Certificates.*] Bequest of "half my property at R.'s bank." At the time of his will and of his death the testator had at R.'s bank in Paris a cash balance and certificates of French shares, some inscribed and some transferable by delivery, which were deposited with the bankers, who received the dividends and carried them to his credit. He had nothing else at the bank:—*Held*, by Chitty, J., that only half of the cash balance passed by the bequest:—*Held*, on appeal, that a moiety of the shares also passed. *In re* Prater. Desinge *v.* Beare - - - C. A. 481

—— Gift to charity—Marshalling - - 637
See Charity.

—— Testamentary appointment—Revocation 143
See Power.

WINDING-UP - - - 83, 191, 508, 712
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WORDS—"Children" - - - 695
See Will. 3.

—— "Distinctive devise" - - - 112
See Trade-mark.

—— "Fancy words" - - - 112
See Trade-mark.

—— "Property at bank" - - - 481
See Will. 7.

—— "Representatives" - - - 695
See Will. 3.

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